Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

TEAMSTERS LOCAL UNION NO. 293
Petitioner,

v.

TRUSERV CORPORATION
f/k/a Cotter & Company,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI OF TEAMSTERS LOCAL UNION NO. 293

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106 pp

QUESTIONS PRESENTED FOR REVIEW

I. Did the D.C. Circuit Misapprehend or Grossly Misapply the "Substantial Evidence" Standard of Review Established in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951) and *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254 (1968), When it Failed to Consider Whether a Reasonable Mind Could Have Concluded as the Board Did and Replaced the Reasonably Drawn Inferences of the Board with Those of its Own?

II. Did the D.C. Circuit Erroneously Conclude as a Matter of Law that the Evidence Was Insufficient to Defeat a Finding of Impasse When the Union Had Failed to Offer a "Substantial Change" in Its Position after the Employer's Last Offer?

III. Did Substantial Evidence on the Record Support the Board's Finding of No Impasse?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. ***Intervenor-Union***

Teamsters Local Union No. 293, a/w International Brotherhood of Teamsters, AFL-CIO

2. ***Respondent***

National Labor Relations Board, represented by Aileen A. Armstrong, 1099 14th Street, N.W. Washington, D.C. 20570-0001

3. ***Petitioner-Employer***

Tru-Serv Corporation, fka Cotter & Company, represented by Mark V. Webber and Kenneth D. Schwartz, Duvin, Cahn & Hutton, Erieview Tower, 29th Floor, 1301 East Ninth Street, Cleveland, Ohio 44114 and Kathy B. Houlihan, Morgan, Lewis & Bockius, L.L.P., 1800 M Street, NW, Washington, D.C. 20036-5869.

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STATEMENT OF JURISDICTION

On July 6, 2001, the United States Court of Appeals for the District of Columbia Circuit issued a judgment granting, in part, denying, in part, and remanding, in part, Tru-Serv's Petition for Review. Subsequently, Teamsters Local Union No. 293 filed a Petition for Rehearing and Rehearing En Banc, which was denied on August 17, 2001. A Petition for Rehearing was also filed by Tru-Serv and the National Labor Relations Board, which was denied in part and granted in part on August 17, 2001. Because this Petition for a Writ of Certiorari was filed within ninety (90) days from the date of the denial of the petitions for rehearing, jurisdiction to review the judgment of the Court of Appeals for the D.C Circuit on writ of certiorari is conferred on this Court pursuant to 29 U.S.C. § 2101(c).

STATUTES INVOLVED IN THIS CASE

29 U.S.C. § 158 Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for `n employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed section 157 of this title;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provision of Section 159(a) of this title.

* * *

(d) Obligation to bargain collectively

For the purposes of this section to bargain collectively is the performance of the mutual obligations of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question thereunder, and the execution of the written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to a proposal or require the making of a concession: . . .

I. STATEMENT OF THE CASE

A. *Course of Proceedings and Federal Jurisdiction of the Court of Appeals*

Teamsters Local Union No. 293 ("Union") filed unfair labor practice charges against the Employer, then Cotter & Company, ("Employer") alleging several violations of the National Labor Relations Act ("Act"). After a thorough investigation of the unfair labor practice charges, Region 8 of the National Labor Relations Board ("Board"), issued a complaint on May 30, 1996, alleging that the Employer had violated Sections 8(a)(1), (3), and (5) of the Act, by inter alia, refusing to bargain in good faith with the Union and by unlawfully disciplining and discharging its employees, pursuant to its authority as stated in 29 U.S.C. § 160(a).

After the parties presented evidence at a hearing before Administrative Law Judge Steven M. Charno, ALJ Charno concluded that the Employer, did engage in unfair labor practices within the meaning of Section 8(a)(5) of the Act, by refusing to meet and continue to bargain with the Union over the terms and conditions of a collective bargaining agreement, implementing its last offer absent an impasse in negotiations, disciplining employees pursuant to unlawfully implemented work rules, bypassing the Union and dealing directly with a unit employee, refusing to process grievances and unlawfully discontinuing dues deductions on behalf of its employees.

Exceptions to the ALJ's Decision were filed by the Employer and General Counsel on or about April 11, 1997. The Union responded to the Employer's Exceptions in its Answering Brief. Upon review of the record, the Employer's Exceptions and the Union's Answering Brief, the Board issued a Decision and Order, affirming all of the findings of the ALJ, excepting his finding that the Employer violated the Act by terminating dues deductions for the unit employees upon contract expiration. The

Decision and Order of the Board is dated July 19, 2000 and cited at *Cotter & Company*, 331 N.L.R.B. No. 94 (2000).

The Employer subsequently filed a timely Petition for Review of the Decision and Order of the Board in the Court of Appeals for the District of Columbia Circuit. Jurisdiction was conferred on the Court of Appeals for the District of Columbia Circuit to review the Decision and Order pursuant to 29 U.S.C. § 160(f).

The Court of Appeals granted the Employer's Petition for Review, in part, concluding that the parties were at impasse because the Union failed to offer a substantial change in its position in response to the Employer's last offer. Consequently, the Court of Appeals further concluded that the Employer lawfully implemented its final offer, including amended work rules, which led to the discipline of employees. The Court of Appeals denied the Petition for Review, in part, concluding that the Employer had unlawfully abandoned the parties' grievance procedure.

Given the Court of Appeals gross disregard for this Court's decisions in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951) and *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254 (1968), and its application of the "substantial change" standard to determine whether the parties were at impasse, the Union filed this Petition for a Writ of Certiorari.

B. *Statement of Facts*

The Union is a "labor organization" within the meaning of Section 2(5) of the National Labor Relations Act of 1935, 29 U.S.C. § 152(5) (2001). The Union is the exclusive bargaining agent of the warehousemen employed at the Employer's Westlake, Ohio facility. The Employer is an "employer" engaged in interstate commerce within the meaning of Section 2(2) and (6) of the Act.

In the advent of the expiration of the warehouse unit agreement between the Employer and the Union, the parties began negotiating a new agreement on July 20, 1995. (JA at 30, 196; T. at 180A, 181A.) Chief Spokesperson, Charles Smith, Attorney John Masters, and an employee negotiating committee, which consisted of Russell Tegemeir, Dave Guam, Rich Martin, Mike Hanobik and Adam Csongedi, represented the Union. (JA at 30, 195; T. at 179A.) The Employer was represented by Attorney Wendell Provost, Brian Kidd and Wayne McIntosh.[1] (JA at 30, 196; T. at 180A.)

First Meeting - July 20, 1995.

The Employer initiated the six hour bargaining session with remarks from its chief negotiator, Wendell Provost. (JA at 30, 325; T. at 669A.) Upon completing his opening statement, the Union began its presentation by introducing its proposals one by one, and entertaining any questions the Employer had concerning those proposals. (JA at 198; T. at 183A, 184A.) When the Union began discussing its economic proposals, the Employer advised that it would not discuss major economic issues until certain language issues were resolved. (JA at 198; T. at 184A.) The Employer subsequently introduced its proposals on those language issues. Most notably, the Employer proposed that six paid holidays be changed to personal holidays,[2] and that the work week be changed to four consecutive ten hour days or five consecutive eight hour days, Sundays to Saturdays inclusive. (JA at 200, 339; T. at 186A, 687A; *see also* JA at 579-580; General Counsel

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[1] Bill Livingston joined the Employer's bargaining committee on August 2, 1995. (JA at 196; T. at 180A, 194A.) David Cho also participated in the August 29, 1995 meeting. (T. at 662A.)

[2] The Union had initially proposed to add two more paid holidays. (JA at 337; T. at 685A.) The Union also sought to limit the number of hours employees worked the day before and after a holiday to ten hours. (JA at 338; T. at 686A.)

("GC") Exhibit 23.) The Union rejected these proposals and requested the Employer to offer a basis for these changes. (T. at 186A.) The Employer purported that the necessity of these changes basically rested on competitive, member and customer service reasons. The meeting ended with a minor tentative agreement over some language in the grievance procedure section of the contract. (JA at 199; T. at 185A.)

Second Meeting - July 21, 1995.

In the second meeting, both parties discussed and responded to the other's proposals. The Union advised the Employer that it needed more information regarding its holiday and work week proposals. (JA at 201; T. at 188A.) The parties agreed that the term of the contract would be for three years. (JA at 202; T. at 189A.) They also reached a final agreement to delete the peer review language from the grievance procedure section of the contract. (JA at 202; T. at 189.) The parties, however, could not agree to the Union's proposal regarding a new arbitration procedure. Having recently experienced the Employer's unfounded disregard for the finality of the present arbitration scheme, the Union desired a mechanism that would evince the Employer's commitment to final and binding arbitration. (JA at 30; T. at 703, 784.) The Employer, however, rejected the Union's proposal outright. (JA at 30; T. at 705.)

Third, Fourth and Fifth Meeting - August 2-4, 1995

In this series of meetings, the parties did not discuss significant economic issues. The parties continued to discuss the Employer's holiday and work week proposals. (JA 205-206; T. at 192A-193A.) The Union was reluctant to accept any proposal that required its members to work on traditional holidays, such as New Year's Day, Memorial Day and Independence Day. (JA at 206; T. at 192A.) The Union moved on the issue by exchanging the day after Thanksgiving for Martin Luther King's Day as a holiday. The Employer rejected the Union's counter-proposal. The Union

was also concerned about the work week proposal, especially since the Employer had not as yet provided the information the Union had requested in the July 20, 1995 meeting. Additionally, the Union was not willing to accept a proposal that required its members to work both Saturday and Sunday at straight time. (JA at 205; T. at 192A-193A.)

On August 2, 1995, the Union made several modifications to their proposals and withdrew others. It withdrew proposal (1), which would have substantially increased the union's jurisdiction. (JA at 206; T. at 195A.) The Union also withdrew proposal (1)(A), which contemplated reducing the probationary period for new employees. (JA at 576; GC Exhibit 22.) The Employer failed to respond to any of the Union's concessions, and did not withdrawal any of its proposals. (JA at 206; T. at 195A.) Again, the parties did not discuss economics. (JA at 206; T. at 195A.) Rather, most of the meeting was consumed with discussions concerning the holiday and work week proposals.

In the fourth meeting on August 3, 1995, the Employer offered numbers on the cost of the health plan. (JA at 208; T. at 197A.) Other than that single submission, the parties did not discuss economics. (JA at 208; T. at 197A.) The parties revisited work rule issues, concerning mandatory overtime and supervisors doing bargaining unit work. (JA at 30; T. at 198A.) The Union concluded that the contract generally did not include work rules. Rather, it maintained that the Employer had a right to make and enforce reasonable rules, and the Union could challenge their validity at arbitration. (JA at 210; T. at 200.) While the parties reached a tentative agreement over overtime breaks, they were not able to make any progress over the holiday and work week proposals. (JA 30, 210; T. at 200-201.) The Employer simply refused to make any concessions. (T. at 201.)

By August 4, 1995, the parties had definite agreements on peer review, the term of the contract, and overtime breaks. (JA at 210A; T. at 200A.) The parties continued to discuss the holiday

and work week proposals, (JA at 30, T. at 202), and the Union likewise continued to request the information it needed to fully consider the Employer's work week proposal. (JA at 30; T. at 202A.) At this point, the Employer was fully aware that the Union could not accept the work week proposal until it supplied the Union with a definite schedule. (T. at 202A.) As expected, the Employer persisted in its avoidance of economic issues. (T. at 202A.) Although the parties had not reached an agreement on the holiday and work week proposal, neither Mr. Smith or Mr. Provost had declared an impasse.[3]

The Final Meetings - August 23, 28, 29, 1995.

On August 23, 1995, the parties met unexpectedly. Consequently, the Union's representatives were not all in attendance. (JA at 30; T. at 225.) The Employer addressed the Union's August 4, 1995 proposal, but initially failed to accept any of the Union's proposals. Provost then stated that he felt the parties were at an impasse on the language issues. (JA at 216; T. at 227A.) Mr. Smith then responded by suggesting the parties may be at impasse on the non-economic issues; however positions could change after economic issues were considered. (JA at 216; T. at 227A.) While economic issues were not discussed at this sixth meeting, Mr. Provost stated that it would bring an economic proposal for the seventh meeting. (JA at 216; T. at 227A.)

All parties were in attendance at the seventh meeting, with the exception of Wayne McIntosh. (JA at 218; T. at 229.) At the beginning of the meeting, Mr. Masters unequivocally stated that the parties had not reached an impasse. (JA at 218; T. at 229A.) Quite the contrary, Mr. Masters asserted that there were several points the Union was willing to move on, and indicated that there

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[3] One of the employees on the Union's bargaining committee did declare that an impasse had been reached on the holiday proposal on August 4th, but the Union's attorney immediately and vehemently denied the existence of any impasse.

had been movement by both parties. (JA at 219; T. at 230A.) The Employer finally offered an economic proposal consisting of the following: Wages for lower-tier employees would increase twenty cents in the first year of the contract, twenty cents in the second year, and twenty cents in the final year of the contract; for top-tier employees wages would increase twenty cents in the first year, ten cents in the second year, and ten cents in the third year. (JA at 220-221; T. at 231A-232A.) The Union had previously proposed that the Employer delete the second tier of employees and increase wages by seventy-five cents in each year of the contract. (T. at 233A.) After hearing the Employer's proposal for the first time, the Union caucused and decided to modify their proposal in two respects. (JA at 223; T. at 234A.) First, the Union counter-proposed a wage increase of sixty-five cents each year of the contract. (JA at 224; T. at 235A.) Second, in lieu of its proposal to delete completely the lower tier, the Union proposed a second-tier that would subside after four years. (JA at 224; T. at 235A.) In addition, the Union withdrew its double time proposal. The Union also modified its 401k proposal, by permitting employees to elect the Employer's 401k plan as late as the second year of the contract. (JA at 254; T. at 272A.)

Non-economic issues also resurfaced in the August 28, 1995 meeting. Employer reopened discussion over the term of the contract and moved to change the agreed upon contract term from three years to 42 months. This regressive proposal understandably was met with rejection. Negotiations over other proposals, however, yielded progress. Rather than dwell on the parties' seemingly implacable conflict over the Employer's holiday and work week proposal, the Employer continued to modify its holiday proposal by dropping Memorial Day, thereby leaving only the Fourth of July, Labor Day and the day after Thanksgiving to be converted. (JA at 231; T. at 244; *see also* JA at 451; Employer Exhibit I at 38.) Additionally, the Employer's offering of the long-awaited information regarding scheduling compelled the Union to alter their initial position of complete rejection to proposing a work week of five eights or four tens for outbound support,

Sunday through Saturday inclusive, and five eights and four tens for inbound support, with the exception that weekends would be strictly on a volunteer basis for inbound support. (JA at 228; T. at 239A.) The Union, however, conditioned its proposal on the Employer committing to a starting time, (JA at 229; T. at 240A), and clarifying overtime issues. Under the Union's proposal, Employer would pay outbound support employees time and a half for a fifth ten hour day or a sixth eight hour day; it would pay inbound support employees time and a half for a fifth ten hour day or a sixth eight hour day and double time for a sixth ten hour day or a seventh eight hour day. (JA at 229; T. at 240A.).

In response to the Union's counter proposal, the Employer stood firm over the issue of contract duration, but offered another wage proposal, whereby it would increase the wages of second-tier employees by twenty-five cents in the first two years of the contract and twenty cents in the last year; it would increase top-tier employee wages by twenty-five cents in the first year of the contract, fifteen cents in the second, and twenty cents in the final year. (JA at 231; T. at 244A.) In addition, the Employer finally offered starting times for its work week proposal. Specifically, the Employer indicated that the first shift could begin anytime between four a.m. and nine a.m., and that the second shift could begin anytime between four p.m. and eight p.m.. (JA at 231; T. at 244A.). The Employer also proposed to contribute $252.00 per month per employee to the Union's Health and Welfare Plan in the first year, and no more than 75% of the total cost of the Employer plan in subsequent years. (JA at 232; T. at 245A.)

The Union began the August 29, 1995 meeting by countering the Employer's previous proposal. (JA at 234; T. at 247A.) In its wage proposal, the Union decreased its wage proposal from sixty five cents to sixty cents in the first year and fifty-five cents in the final two years. (JA at 235; T. at 248.) Additionally, the Union proposed the elimination of the two tier system in five rather than four years. (JA at 235; T. at 248.) Regarding the work week and holiday proposals, the Union

indicated that it still needed more clarification on the former proposal, but expressly stated that "it was willing to work on some type of a different work week."[4] (JA at 235; T. at 248.) The Union further modified its 401k proposal, by permitting employees to enter the plan in the third year of the agreement. (JA at 257; T. at 279.) Finally, the Union withdrew its mandatory overtime proposal. (JA at 235; T. at 248.)

In response to the Union's proposals, the Employer made modifications to its holiday proposal, demanding only that the day after Thanksgiving be converted into a personal day. (JA at 236; T. at 249A.).[5] The Employer increased contributions and proposed that employees be offered an option to choose either the Union's plan or Employer's. (JA at 237; T. at 250A.) For second-tier employees, the Employer offered thirty cent wage increases in the first and second years of the contract and twenty five cents in the third. (JA at 237; T. at 250A.) In this round, the Employer also agreed to a contract term of three years. (JA at 237; T. at 250A.)

In the afternoon session, the Union withdrew its wage proposal to eliminate the lower tier of wages, lowered its wage proposal for top tier employees from a sixty cents increase to a fifty cents increase in each contract year, and proposed sixty cents in the first year, seventy cents in the second year and eighty cents in the third year of the contract for second-tier employees. (JA at 239; T. at 252A.) The Union accepted the Employer's holiday proposal, provided Martin Luther King Day could be used as a personal day. (JA at 240; T. at 253A.) In addition, the Union

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[4] Because the proposals were incredibly non-specific, the Union simply could not come to a final agreement on the work week issue. (T. at 276.) The issue could have been resolved much earlier had the Employer produced the information the Union requested in the very first bargaining session.

[5] Initially the Employer had proposed that five holidays be converted to personal days. (JA at 237, T. at 250A.)

reduced its shift premium demand from thirty-five cents to thirty cents per hour. (JA at 457; Employer Exhibit K at 44.)

Following its mid-afternoon caucus, Employer returned to negotiations with what it termed its last, best and final offer. (JA at 240; T. at 253A.) In its final proposal, Employer proposed a thirty cents increase in each contract year for second tier employees, (JA at 241; T. at 254A), and a twenty-five cents increase in the first year, and fifteen cents in the last two years of the contract for first-tier employees. (JA at 242; T. at 255A.)[6] The Employer also raised contributions to the Health and Welfare Fund to $252.00 in the first year, $260.00 in the second year and 270.00 in the third year. (JA at 241; T. at 254A.) Respecting its holiday proposal, the Employer again modified; this time demanding that the day after Thanksgiving be changed to a personal day. (JA at 244A; T. at 257A.)

After addressing each of its proposals, Mr. Provost advised the Union that the arbitration procedure and dues checkoff would not be available if the contract was not ratified by August 31, 1995. (JA at 245; T. at 258A.) The Employer further advised that it would implement its last, best, and final offer and would not deduct initiation dues if the parties failed to reach an agreement. (JA at 245; T. at 258A.) Before leaving the bargaining session, Mr. Provost indicated that he was going to his hotel room, but that he would be willing to entertain any questions that the Union might have regarding the Employer's last proposal. (JA at 247; T. at 260A.) In response to the Employer's abrupt conclusion of the negotiations, Masters indicated that the Union did not believe negotiations had come to an impasse, and that the Employer risked violating the Act if it implemented its proposals. (JA at 386-387; T. at 77A-778A.) After Provost left the bargaining session, the Union telephoned Provost, but there was no answer. (JA at 246; T.

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[6] Employer proposed to add an additional nickel to the third year if the contract was ratified by August 31, 1995.

at 259A.) Smith then went to the front desk and discovered that Provost had already checked out. (JA at 247; T. at 260A.)

After the bargaining sessions, the committee presented the Employer's last offer to the employees. Upon reviewing the terms of the Employer's last offer, the employees voted not to vote on the contract. (JA at 249; T. at 264A.) On August 31, 1995, Mr. Masters and Mr. Smith telephoned Mr. Provost to advise him of the employee's response and the Union's willingness to meet and negotiate further. (JA at 250; T. at 265A.) Mr. Provost refused to meet again, stating "further meetings would not be worthwhile", as the Union had Employer's last, best and final offer. (JA at 250, 378; T. at 265A, 742A.) On or about September 10, 1995, the Union again attempted to bring Employer back to the bargaining table, but again the Employer refused. (JA at 250; T. at 265A.) Unbeknownst to the Union, the Employer had already implemented its last offer on September 8, 1995. (JA at 31; T. at 267A.) As of September 1, 1995, the Employer had revoked the arbitration, dues checkoff and initiation fees procedures. (JA at 31; T. at 267A-268A.) The Employer converted the day after Thanksgiving into a personal day, (JA at 253; T. at 269A), increased the wages of top-tier and second tier employees by thirty cents and twenty-five cents respectively, (GC Ex. 34), and ordered overtime without properly notifying employees in advance. (JA at 31; T. at 40.) Additionally, the Employer unilaterally implemented work rules nos. 3 and 5, pursuant to which, several employees, who had served on the Union's negotiating committee, were disciplined or terminated. (T. at 35.)[7]

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[7] Gonzalez received a verbal warning and a suspension for not working scheduled overtime under work rule no. 5. Matthew Dillon received warnings under work rule no. 5. Martin received a verbal warning under work rule no. 5. Csongedi received discipline under unilaterally implemented quality standards.

II. SUMMARY OF ARGUMENT

The Union's Petition for a Writ of Certiorari should be granted because (1) the D.C. Circuit's decision conflicts with decisions of this Court; and (2) it decided important issues of federal labor law that have not been, but should be, settled by this Court.

First, the D.C. Circuit decision conflicts with this Court's decisions in *Universal Camera v. N.L.R.B.*, 340 U.S. 474 (1951) and *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254 (1968). Specifically, the D.C. Circuit misapprehended or grossly misapplied the "substantial evidence" standard in failing to consider whether a reasonable mind could have concluded as the Board did and in replacing reasonably drawn inferences of the Board with those of its own. A reviewing court has a duty to provide an explanation as to why it believes the Board's findings are not supported by substantial evidence; for sure, it must evaluate the reasonableness of the Board's decision and determine whether a reasonable mind could or could not have concluded as the Board did. If not, the reviewing court's decision comes dangerously close to a *de novo* review — a review that pays no deference to the Board's expertise.

Likewise, a reviewing court may not simply replace reasonably drawn inferences and the Board's findings of fact with those of its own. Even if the reviewing court would have reached a different conclusion, the reasonable findings of the Board may not be disturbed. Here, the Board concluded, after examining several factors, that the parties did not have a contemporaneous understanding as to the status of negotiations. On review, the D.C. Circuit simply replaced that finding with its own and concluded to the contrary. As such, the D.C. Circuit grossly misapplied the substantial evidence standard, and therefore, the Union's Petition should be granted.

Second, the D.C. Circuit decided an important question of federal law not previously decided by this Court. That is, must a party, presented with a final offer, substantially change its position to defeat a bargaining impasse? Based on Board precedent, the answer must be no. Yet, the D.C. Circuit concluded that in the absence of a "substantial change," the evidence in the record was not sufficient to demonstrate the Union's willingness to negotiate further. Because the Board has never required such a change in a pre-impasse context, but only in a post impasse context to determine if an impasse has been broken, the D.C. Circuit erroneously applied the "substantial change" standard in the preceding below.

Finally, the D.C. Circuit erroneously concluded that the Board's finding of no impasse was not supported by substantial evidence. As such, this case presents this court with an excellent opportunity to address the important federal labor law issue of when a bargaining impasse occurs. While this issue has traditionally been reserved for the Board, this Court should intervene where, as here, the Circuit Court grossly deviated from the well-settled principles which have greatly informed the Board's decisions concerning the subject of impasse.

Notably, the Circuit Court completely disregarded the Board's finding that the parties demonstrated flexibility on important issues in the final days of bargaining. Strangely, this was not a state of affairs that could be characterized as "deadlocked", but rather, each party was moving on their respective proposals and making concessions. By disregarding this rather significant finding, among others, the D.C. Circuit, in effect, displaced well-settled Board precedent respecting impasse. Therefore, this Court should grant the Union's petition.

III. LAW & ARGUMENT

A. *The Union's Petition Should Be Granted Because the D.C. Circuit Misapprehended or Grossly Misapplied the "Substantial Evidence" Standard of Review Established in Universal Camera Corp. v. N.L.R.B. and N.L.R.B. v. United Insurance Co.*

In setting aside the Board's decision, the D.C. Circuit exceeded its authorized scope of judicial review. It is well-settled that the Board's findings of fact respecting the existence of an impasse are entitled to substantial deference. *Grinnel Fire Protection Sys. Co. v. N.L.R.B.*, 236 F. 3d 187, 200 (4th Cir. 2000); *N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.*, 174 F. 3d 13, 27 (1st Cir. 1999); *Teamsters Local Union No. 639 v. N.L.R.B.*, 924 F. 2d 1078, 1083 (D.C. Cir. 1991); *N.L.R.B. v. WPIX, Inc.*, 906 F. 2d 898, 902 (2d Cir. 1990). As the D.C. Circuit recognized, in this oft-quoted passage, " [i]n the whole complex of industrial relations few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a board which deals constantly with such problems." *American Fed'n of Television and Radio Artists* v. N.L.R.B., 395 F.2d 622, 627 (D.C. Cir. 1968).

Accordingly, a reviewing court may not set aside a Board decision, unless ". . . it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951). Evidence is substantial if " . . . the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses . . . ." *Id.* at 491. More recently, this Court noted that, in deciding whether the Board's findings of fact are supported by substantial evidence on the record as a whole, the reviewing court " . . . must decide

whether on this record it would have been possible for a reasonable jury to reach the Board's conclusions." *Allentown Mack Sales and Service, Inc, v. N.L.R.B.*, 522 U.S. 359, 366-367 (1998). In yet another context, this Court stated that an administrative agency's decision is not to be reversed, unless the record is "so compelling that no reasonable fact-finder could fail to find" to the contrary. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

Additionally, a reviewing court may not displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before the court *de novo*. *Universal Camera Corp.*, 340 U.S. at 488; *N.L.R.B. v. United Ins. Co.*, 390 U.S. 254, 260 (1968). Relying on these principles, several Circuit Courts, including the D.C. Circuit, have concluded that the Board's findings, so long as they are reasonable, may not be displaced on review even if the court might have reached a different result had the matter been before it *de novo*. *The WackenHut Corp. v. N.L.R.B.*, 178 F. 3d 543 (D.C. Cir. 1999); *N.L.R.B. v. Roll and Hold Warehouse and Distribution Corp.*, 162 F. 3d 513 (7th Cir. 1998); *APX International v. N.L.R.B.*, 144 F. 3d 995 (6th Cir. 1998); *Laro Maintenance Corp. v. N.L.R.B.*, 56 F. 3d 224, 229 (D.C. Cir. 1995).

In its decision, the D.C. Circuit concluded that the Board's finding of no impasse is not supported by substantial evidence. *TruServ Corp. v. N.L.R.B.*, 254 F. 3d 1105, 1115 (D.C. Cir. 2001). In reaching this conclusion, the D.C. Circuit focused on two "findings" of the Board: (1) the Board's finding that the Employer's offer was not truly "final;" and (2) the Board's finding that neither party was at the end of its bargaining rope. *Id.* In evaluating these findings, the D.C. Circuit erred in two ways. First, the Board did not find that the Employer's offer was not truly "final", and so, the D.C. Circuit's assertion that it was not supported by substantial evidence has no meaning. Second, the D.C. Circuit misapprehended or grossly misapplied the substantial

evidence standard in failing to demonstrate the unreasonableness of the Board's actual findings and in displacing reasonably drawn inferences of the Board with those of its own. Accordingly, the Union's Petition should be granted.

1. The D.C. Circuit Grossly Misapplied the Substantial Evidence Standard When It Failed to Consider Whether a Reasonable Mind Could Have Concluded as the Board Did.

A reviewing court must accept the Board's findings of fact if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp.*, 340 U.S. at 477. Accordingly, a reviewing court misapprehends or grossly misapplies the substantial evidence standard if it fails to consider whether a reasonable mind could have concluded as the Board did on the basis of the record as whole. *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 456 (1986)(holding the Court of Appeals grossly misapplied the substantial evidence test where a reasonable mind could conclude as the FTC did); *American Textile Manufacturing Institute, Inc. v. Donovan*, 452 U.S. 490, 530 (1981) ("We cannot say that the Court of Appeals in this case misapprehended or grossly misapplied the substantial evidence test when it found that "OSHA reasonably evaluated the cost estimates before it, considered criticisms of each, and selected suitable estimates of compliance costs").

In determining whether an impasse existed, or more specifically, whether there was a realistic possibility that continuation of discussion would have been fruitful, the Board considers, among other things, the parties demonstrated flexibility and willingness to compromise in an effort to reach an agreement. *Wycoff Steel*, 303 N.L.R.B. 517, 523 (1991). In the instant case, the Board, in fact, reviewed the negotiations and determined as follows:

> . . . until the Respondent abruptly claimed that its last, best and final offer" was on the table and would be implemented unilaterally if not accepted, both Respondent and the Union had demonstrated considerable flexibility and willingness to compromise their positions. Thus, . . . there had been movement on both sides concerning important subjects such as wages, benefits, and holidays . . .

Cotter & Company, 331 N.L.R.B. No. 94, slip op. at 1. Based on this finding, and those discussed herein, the Board concluded that there was a realistic possibility that continuation of discussions at that time would have been fruitful.

Upon reviewing this finding, the D.C. Circuit never considered whether it was reasonable. It did not, for instance, determine, conclude or even mention in passing, that a reasonable fact-finder could not have concluded, based on the fluidity of negotiations demonstrated by the parties, that there was a possibility that further discussions would have been fruitful, or that the record was so compelling that no reasonable fact-finder could have failed to find to the contrary.

Instead the D.C. Circuit supported its conclusion that the Board's finding of no impasse was not supported by substantial evidence by claiming the Board relied on a fact with no basis in the record, i.e., that the Employer's final offer was not truly "final". *TruServ*, 254 F. 3d at 1115-1116. The Board, of course, made no such finding. Indeed, this segment of the Board's decision was clearly limited to the parties considerable flexibility and movement prior to the Employer's declaration of its "last, best and final offer." Apparently, the D.C. Circuit, in reviewing the Board's discussion of the parties considerable flexibility, was convinced that the Board had instead found that the Employer's offer was not truly final because the Board's decision stressed that the Employer's final offer was "abrupt" and "surprising." The

D.C. Circuit then discredited the phantom finding by relying on the forewarning of the Employer's negotiator that he would have used the term "last, best and final offer" when he had exhausted his authority. *TruServ Corp.*, 254 F. 3d at 1116. Simply put, the D.C. Circuit concluded that the Union could not have been surprised given the Employer's previous announcement on August 4th, and therefore, it was not supported by substantial evidence. This conclusion simply failed to address the actual finding of the Board that an impasse had not been reached because there had been " . . . considerable flexibility and movement on both sides concerning important issues . . .". *Cotter & Co.*, 330 N.L.R.B. No. 94, slip op. at 1.

Likewise, the D.C. Circuit did not address whether the Board's finding that "the parties did not have a contemporaneous understanding that they were at impasse" was reasonable. In reaching this conclusion, the Board relied on several factors: (1) the concessions made by both parties in the last bargaining session; (2) the statement of the Union's attorney that the parties were not at impasse and that the Employer would act unlawfully if it implemented its last offer; (3) the statement of the Union that the Employer was not offering anything that the Union could recommend to the employees; and (4) the Union's request for additional bargaining and meetings two days after the last session. *Cotter & Co.*, 331 N.L.R.B. No. 94, slip op. at 2. Predictably, the Employer contended that the parties were at impasse based on the Union's comment that there was nothing it could recommend to the employees. The Board, however, disagreed, finding as follows:

> It is a commonplace that experienced negotiators make concessions cautiously and that negative initial reactions are later reconsidered in order to obtain agreement." (citations omitted). In the context of these negotiations–where the parties had been confronting difficult issues in a constructive manner–the Respondent's abrupt

> declaration that its most recent offer was "final" and would be implemented unilaterally if rejected was a surprising development. In that context, we regard the Union's response . . . as understandable expression of dissatisfaction with the position just taken by the Respondent. Such a response is not reasonably interpreted as a firm indication of the Union's unwillingness to negotiate further or make additional concessions."

Cotter & Co., 331 N.L.R.B. No. 94, slip op. at 1-2. The D.C. Circuit, while mentioning the Board's finding in its recitation of the facts, failed to demonstrate or even suggest that a reasonable fact-finder could not have found as the Board did, or that the record offered no support for the Board's finding. Indeed the D.C. Circuit completely ignored the Board's finding in its analysis and merely concluded that the Union's rejection of the Employer's final offer " . . . suggest[ed] circumstances not unlike those relied upon by the Board in *Seattle-First National Bank*." *TruServ Corp.*, 254 F. 3d at 1117.[8] Because the D.C. Circuit failed to determine whether a reasonable mind could have concluded as the Board did, this Court should grant the Union's petition.

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[8] As noted below, the D.C. Circuit first concluded, with respect to this finding, that there was not sufficient evidence to show the Union's willingness to further negotiations because the Union failed to present a "substantial change" in its proposals after the Employer's last offer. This conclusion is faulty, of course, because the D.C. Circuit erroneously demanded more of the Union than is required in Board or Circuit precedent. Moreover, its subsequent reference to *Seattle-First National Bank* is telling; it clearly demonstrated that the Circuit Court had doubts about whether a union has to offer a "substantial change" in order to defeat impasse. *Tru-Serv*, 254 F. 3d at 1117.

2. The D.C. Circuit Misapprehended or Grossly Misapplied the Substantial Evidence Standard Because it Displaced the Board's Choice Between Two Fairly Conflicting Views.

A reviewing court may not displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. *Camera Corp.*, 340 U.S. at 488; *N.L.R.B. v. United Ins. Co.*, 390 U.S. 254, 260 (1968); *see also Consolo v. FMC*, 383 U.S. 474, 477 (1951)("[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence"); *N.L.R.B. v. Roll and Hold Warehouse and Distribution Corp.*, 162 F. 3d 513 (7th Cir. 1998)(" . . . under the substantial evidence standard of review, w will not displace the inferences chosen by the Board, though we would justifiably have made a different choice had the matter been before us de novo"). *APX International*, 144 F.3d at 1000 (6th Cir. 1998) ("[w]e may not substitute our judgment on the question of whether the inference drawn is the correct one or whether a different inference would be better supported; this court is limited to the determination of reasonableness–not rightness"). Accordingly, a reviewing court misapprehends or grossly misapplies the substantial evidence test in simply replacing the reasonably drawn findings or inferences of the Board with those of its own.

The D.C. Circuit addressed the Board's finding that the parties did not have a contemporaneous understanding as to impasse in two ways. First, as noted above, it concluded that the Union's conduct of denying impasse and its request for additional meetings was insufficient, as a matter of law, to demonstrate its desire to pursue further negotiations. Second, the D.C. Circuit, disagreeing with the inference that the Board drew from the Union's initial reaction to the Employer's last offer, and other relevant factors, concluded that facts supported the exact opposite conclusion. In so doing, the D.C. Circuit, again, did not explore

the reasonableness of the Board's finding with respect to the Union's initial reaction (in fact ignores it) and simply displaced the Board's interpretation of the Union's initial reaction with its own. Specifically, the D.C. Circuit concluded that the facts of this case were not unlike those in *Seattle-First National Bank*, in which the Board found impasse. Presumably then, the D.C. Circuit implies that the Board should have found that an impasse existed.

The D.C. Circuit's reliance on *Seattle-First National Bank*, 267 NLRB 897 (1984) is faulty for several reasons. First, if the Board had concluded that the Union was unwilling to negotiate further simply because the Board had found an unwillingness to negotiate further under similar circumstances in *Seattle-First National Bank*, it would have engaged in the kind of fact-finding expressly prohibited by *Allentown Mack Sales and Service, Inc. v. N.L.R.B.*, 522 U.S. 359 (1998). Essentially, it would have concluded that only one inference–an unwillingness to negotiate further–could be drawn from this alleged similar set of facts, thereby disregarding all other reasonable inferences. In *Allentown*, this Court explicitly stated that the Board " . . . is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands, [w]hen [it] purports to be engaged in simple fact-finding unconstrained by substantive presumptions or evidentiary rules of exclusion . . .". 522 U.S. at 378. Even if this kind of analysis were correct, Board precedent, upheld on review, establishes that comments like those made in the instant case are not equated with impasse. *See e.g., Beverly Enterprises-Massachusetts, Inc.*, 174 F. 3d at 28 (union response that employer representative should not "hold his breath" not conclusive evidence of impasse); *WPIX, Inc.*, 906 F. 2d at 902 (union's dismissal of employer's proposal as "ridiculous" or a "slap in the face" did not constitute conclusive evidence of impasse).

Second, in relying exclusively on the Union's statement that it could not recommend anything in the Employer's last offer

to the employees, the Circuit Court conceded that it did not review the record as a whole. Third, the Circuit Court simply may not pick and choose among two fairly conflicting inferences. Again, before the Circuit Court disregards or replaces the Board's findings or inferences it must find them to be unreasonable.

Fourth, the facts of *Seattle-First National Bank* are entirely distinguishable. Therein, flexibility had not been demonstrated by the parties, and the union neither denied an impasse had been reached nor requested additional meetings, but rather, stated that the employer's proposals were so onerous that it "could clearly never accept them." 267 N.L.R.B. at 898-899. Such facts do not exist in the instant case.

Plainly, the Circuit Court failed to inquire into the reasonableness of the Board's finding and simply replaced the Board's inferences with its own, and consequently, paid no deference to the Board's extensive experience in examining the posture and reactions of negotiators in collective bargaining. The Union's Petition should, therefore, be granted.

B. *The D.C. Circuit Erroneously Concluded as a Matter of Law that the Evidence in the Record was Insufficient to Defeat Impasse When the Union Failed to Present a "Substantial Change" in its Position in Response to the Employer's Last Offer.*

While the Board considers a host of issues in determining whether an impasse has been reached, *see e.g., Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *enforced. sub nom. AFTRA v. N.L.R.B.*, 395 F.2d 622 (D.C. Cir. 1968)(bargaining history, the good faith of parties, the length of the negotiations, the importance of the issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, the parties willingness to negotiate are all relevant factors), it has never required a party to substantially change its

position in response to a party's last offer. On the contrary, this inquiry or standard has been reserved exclusively for determining whether an impasse has been broken. *Airflow Research & Manufacturing Corporation*, 320 N.L.R.B. 861(1996)(substantial change in bargaining position will revive the employer's obligation to bargain over the subject of impasse); *Civic Motor Inns*, 300 N.L.R.B. 774 (1990). This is so because "mere willingness is not enough[]" to break an impasse. *Retlaw Broadcasting*, 324 N.L.R.B. 1148 (1997).

Indeed, the decision upon which the D.C. Circuit relies in reaching its faulty conclusion concerned post-impasse circumstances. *Serramonte Oldsmobile, Inc. v. N.L.R.B.*, 86 F. 3d 227 (D.C. Cir. 1996). In *Serramonte*, the D.C. Circuit, relying upon Board precedent, established that bare assertions of flexibility on open issues do not establish sufficient change to *break an impasse*. *Id.* "Rather, there must be substantial evidence in the record that establishes changed circumstances sufficient to suggest that future bargaining would be fruitful." *Id.* Accordingly, the D.C. Circuit determined that substantial evidence did not exist to support a finding of broken impasse where union statements neither committed it to a new position nor contained any specific proposals. *Id.*

Serramonte and the "substantial change" standard set forth therein simply do not apply in a pre-impasse context, because it requires far more than that necessary to demonstrate a finding of no impasse. More succinctly, if one party's willingness to compromise--to move further toward an agreement--is all that is required to find no impasse, then *Serramonte* is clearly not applicable in a pre-impasse context, because such a willingness can be expressed without a substantial change in a party's position

or a clear expression of the areas in which a party foresees future concessions.[9]

Additionally, the D.C. Circuit's reliance on *N.L.R.B. v. H&H Pretzel*, 831 F. 2d 650 (6th Cir. 1987), in support of this conclusion is misplaced. Most notably, neither the findings of the Board nor the ALJ, upon which the Sixth Circuit Court relied, indicated that the Union's offer in response to the Employer's last offer was a mere "token offer" or one in which the Union failed to make a compromise on a specific issue. Both the Board and the ALJ were mainly concerned with the union's unwillingness to address the employer's economic state of affairs. Specifically, the ALJ concluded that continued negotiations would have led nowhere where the union had no intention of *ever* consenting to any reductions in the employer's existing labor costs. As such, the ALJ concluded an impasse existed. Accordingly, the D.C. Circuit application of the "substantial change" standard in a pre-impasse context has no basis in Board or Circuit precedent.

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[9] Assuming arguendo, the D.C. Circuit correctly applied *Serramonte* in a pre-impasse context. Its conclusion was nevertheless erroneous, considering the totality of circumstances leading up to the Company's final offer. Indeed, had the D.C. Circuit reviewed the record as a whole, rather than simply viewing the Union's declaration of no impasse and subsequent request for additional meetings in a vacuum, it would have found that even *Serramonte's* heightened standard was met in this case. Notably, the Union did not make a final offer, *Cotter & Co.*, 331 N.L.R.B. No. 94, slip op. at 9; (JA 15; T. 246-248), nor did it ever state that the Company would not receive further offers from the Union. *Id.* Further on the day the Company declared impasse, a union negotiator, in fact, expressed at least one area in which the Union foresaw future concessions. Specifically, he stated that the union needed further information on the Company's workweek proposal " . . . but was willing to work . . . on some type of a different work week." *Id.*; (JA 15, 235; T. 248A.) Even after the Union's attorney stated that the Union did not believe the parties were at impasse, another union negotiator attempted to call the Company's chief negotiator five (5) minutes after the meeting had ended, but he had already checked out. *Cotter & Co.*, 331 N.L.R.B. No. 94, slip op. at 9; (JA 15, 246-247; T. 259A-260A.) Accordingly, substantial evidence exists in the record as a whole sufficient to demonstrate the Union's desire to pursue further negotiations, even under the "substantial change" test.

C. *The D.C. Circuit Erroneously Concluded that the Board's Finding of No Impasse Was Not Supported by Substantial Evidence.*

While the determination of whether parties have reached impasse traditionally has been reserved to the Board — and whether its findings are supported by substantial evidence to the Circuit Courts — this Court should intervene where established principles, serving the basis for many Board decisions, were disregarded by the Circuit Court in the proceeding below.

In deciding whether an impasse in bargaining existed, "[t]he bargaining history, the good faith of parties in negotiations, the length of the negotiations, the importance of the issues or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered." *Taft Broadcasting Co.*, 163 N.L.R.B. at 478. In addition, the Board has considered the fluidity of the parties' positions, evidence of continued bargaining, actions inconsistent with impasse, demonstrated willingness to consider issues further, and the duration of hiatus between bargaining meetings to determine whether an impasse surfaced during negotiations. *See generally* Patrick Hardin, *The Developing Labor Law*, 693-695 (3rd ed. 1992 & Supp. 1999).

1. **The Board's Finding that the Parties Did Not Share a Contemporaneous Understanding of Impasse is Supported by Substantial Evidence.**

The Board correctly concluded that the Union remained willing to negotiate further. An impasse does not exist, unless both parties refuse to compromise. *Huck Mfg. Co.*, 693 F.2d at 1186. Indeed, "it takes two to be at impasse." *Richmond Recording Corp.*, 280 N.L.R.B. 615, 635, 639-640. Thus, an impasse is never associated with an environment in which one party demonstrates its desire to discuss issues. *Wycoff Steel, Inc.*, 303 N.L.R.B. at 523. Accordingly, the Board has concluded that

an employer's unilateral decree of impasse has no legal effect where a union repeatedly demonstrates its willingness to compromise. *Richmond Recording Corp.*, 280 N.L.R.B. at 639-640.

Certainly, the Board was not unreasonable, as a matter of law, in concluding that there was a realistic possibility that future discussions would have been fruitful, despite the Employer's declaration of its final offer. It is well-settled that a party's assertion of its final position does not, by itself, require a finding of impasse. "It would be both erroneous as a matter of law and unwise as a matter of policy for the Board to find impasse merely because a party is unwilling to capitulate immediately and settle on the other party's unchanged terms." *Grinnell Fire Protection Systems Co. v. N.L.R.B.*, 236 F. 3d 187, 199 (4th Cir. 2000), *see also*, *Beverly*, 174 F. 3d at 28.

In the present case, the parties did not share a contemporaneous understanding as to the state of negotiations. After the Employer presented the Union with its last offer, the Employer refused to return to the bargaining table. From that point, the Union cautioned that it was not under the belief that negotiations had come to an impasse, and any attempt to unilaterally implement the terms of the last offer would contravene the Act. (JA at 387; T. at 778A; *see also* Employer's Exhibit K at 46.) In the days following August 29, 1995, both Masters and Smith advised Employer that good faith negotiations had not exhausted the prospects of an agreement. (JA 250-251; T. at 265-266; *see also* JA at 506, Employer's Exhibit W.) In his correspondence dated August 31, 1995, Masters urged the employer to return the bargaining table so that the parties could reach an agreement. (JA at 506.) Smith similarly attempted to resume negotiations by informing Bill Livingston and his employer that the Union was "willing to sit and work the thing out, you know, negotiate further." (JA at 251; T. at 266.) In addition, Smith's bargaining notes reflect that the union was "willing to work with [the] Employer on work week." (GC

Exhibit 30, 8/29/95 10:00 a.m. session.) While the Employer declined to resume negotiations on each occasion, (T. at 778), the record conclusively established that the Union was willing to bargain and "work out" the issues that the Employer considered most important: the holiday and work week proposals. Accordingly, the D.C. Circuit erroneously concluded that Board's finding that the parties did not share a contemporaneous understanding as to impasse was not supported by substantial evidence.

2. The Board's Finding that the Positions of Employer and the Union Remained Fluid During the Last Days of Bargaining with Respect to the Most Important Issues was Supported by Substantial Evidence.

The Board correctly concluded that the absence of an impasse was supported by the fluidity of the parties positions.[10] In *Wycoff Steel, Inc.*, 203 N.L.R.B. at 523, the Board determined that the employer had prematurely declared impasse. Critical to the Board's determination was the Union's demonstrated flexibility and movement on several issues throughout the course of negotiations.

In the present case, substantial movement occurred on both sides of the bargaining table on August 28-29, 1995. Most curious in this case is the fact that an impasse was not declared in the face of a stalemate, but in the midst of a fruitful discussion

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[10] This certainly was not a case in which the parties were "simply deadlocked." *Laborers Health & Welfare Fund v. Advanced Lightweight Concrete*, 484 U.S. 539, 544 (1988) ("perhaps all that can be said with confidence is that an impasse is a state of facts in which the parties, despite the best of faith, are simply deadlocked").

with respect to some of the more important issues on the table.[11] The Employer's chief negotiator, Wendell Provost, conceded that there was movement in the wage proposals of the Employer and the Union on August 28th and 29th; that both sides moved on their wage rate proposals for both tiers of employees. (JA 383, 384; T. at 772, 773, 774); and that the Union withdrew its proposal to eliminate the second wage tier. (Id.)

The parties movement, however, was not limited to wages. The Union moved from requesting a forty cents shift premium (a twenty-five cents increase) to a thirty cents shift premium. (T. at 775.) The Union also lowered its demand for a safety bonus from $150/$250 to $100/$200, (GC Exhibit 30, 8/29/95, 10:00 a.m. session, Union Counter; *see also* JA 448; Employer's Exhibit H at 35.), and substantially reduced its health and welfare plan contribution demand from its initial proposal of $325/$360/$375 to $304/$340/$355. Finally, the Union modified its 401k counter-proposal from restricting eligibility in the first year of the agreement to permitting employees to enter as late as the last year of the contract.

On August 29, 1995, the Employer increased health and welfare contributions from $252/$255/$260 to $252/$260/$270, and offered several concessions with respect to its holiday and work week proposals. Regarding its holiday proposal, the Employer dropped two more holidays, limiting its demand from six holidays to the day after Thanksgiving. The Employer also agreed to maintain a Monday through Friday work week for outbound support. At this stage, overtime was the only issue unresolved between the parties. With so much movement occurring in the last days of negotiations, the rendering of the Employer's last, best, and final offer, and its subsequent decree of impasse came completely unexpected. Employer's last offer

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[11] According to Provost, the work week/work day, the holiday, and health and welfare issues were the most important to Employer. (JA at 333-334; T. at 681-682.)

served only to short-circuit a fruitful discussion that was just beginning to approach common ground. Far from a state of deadlock, the parties had just arrived on the other side of the bargaining continuum.

3. The Board's Finding that the Parties Did not Reach an Impasse Because of the Limited Amount of Bargaining Sessions Is Supported by Substantial Evidence.

As stated in *N.L.R.B. v. Eltec Corp.*, 870 F.2d 1112, 1117 n.2 (6th Cir. 1989), *cert. denied*, 493 U.S. 891 (1989), "[t]he purpose of the duty to bargain is to give the collective bargaining process a chance to operate regardless of the possibility of success." While it is not a dispositive factor on the question of impasse, some weight must be given to the number of sessions and the time spent on each issue. *N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.*, 174 F. 3d at 28; *Huck Mfg. Co. v. N.L.R.B.*, 693 F.2d at 1186; *N.L.R.B. v. Powell Elec. Mfg. Co.*, 906 F. 2d 1007, 1011 (5th Cir. 1990). This fact certainly lends credence to the conclusion that "negotiations were not sufficiently exhaustive to find that an impasse had already been reached." *Patrick & Co.*, 248 N.L.R.B. 390, 393 (1980).

In the instant case, the parties met a mere eight times throughout the months of July and August. Of those eight days, the parties negotiated in only seven of the meetings and devoted a mere two days to major economic issues. In the first day, the parties spent little time negotiating. Rather, the majority of the day was consumed with rhetoric on both sides and an introduction of proposals. In the next four days, the Employer insisted that major economic issues, i.e., wages and health and welfare contributions, not be discussed until the parties reached agreements on non-economic language issues. Accordingly, the parties devoted four sessions to the Employer's work week and holiday proposals and the Union's arbitration proposal without ever discussing wages and Health and Welfare contributions.

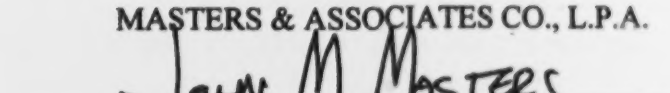
On August 28, 1995, the Employer's adamant approach waned somewhat, and the parties turned to economic issues. Much of the bargaining continued to be consumed with discussions concerning non-economic issues, thereby leaving little time for the parties to fully devote themselves to economic issues. Having established that the Employer offered its last offer in the midst of substantial movement and only after a mere seven bargaining sessions, it is evident that the Employer ended negotiations well before good faith negotiations had exhausted the prospects of reaching an agreement. Therefore, the Board's finding that "eight bargaining sessions of average duration, especially where Respondent did not make an economic proposal until the penultimate session, do not constitute the type of exhaustive negotiations which might prompt a finding of impasse" is supported by substantial evidence in the record as a whole. *Cotter & Co.*, 331 N.L.R.B. No. 94, slip op. at 10. Because there was substantial evidence in the record to support the Board's findings of no impasse, this Court should grant the Union's petition.

IV. CONCLUSION

For the foregoing reasons, the Union respectfully requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

MASTERS & ASSOCIATES CO., L.P.A.



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APPENDIX

Cotter & Company,
331 NLRB No. 94 (2000) A-2

TruServ Corp. v. NLRB,
254 F. 3d 1105 (D.C. Cir. 2001) A-44

Order Granting Joint Petition
for Rehearing by TruServ
and NLRB A-62

Order Denying Petition for
Rehearing and Rehearing En Banc
of Teamsters Local Union No. 293 ..... A-64

Cotter & Company and Teamsters Local Union No. 293, International Brotherhood of Teamsters, AFL-CIO

Cases 8-CA-27692 and 8-CA-28110

NATIONAL LABOR RELATIONS BOARD

2000 NLRB LEXIS 450; 164 L.R.R.M. 1307; 2000-01 NLRB Dec. (CCH) P15,521; 331 NLRB No. 94

July 19, 2000

PRIOR-HISTORY: [*1] Original ALJ-Decision can be found at *1997 NLRB LEXIS 261.*

DECISION AND ORDER

By John C. Truesdale, Chairman; J. Robert Brame III, Member, concurring. Sarah M. Fox, Member, dissenting in part.

COUNSEL:
Mark F. Neubecker, Esq., for the General Counsel.

Mark V. Webber, Esq (Goodman, Weiss, Miller & Goldfarb), of Cleveland, Ohio, for the Respondent;

John M. Masters, Esq. (Masters & Associates), of Cleveland, Ohio, for the Union.

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

OPINION:

On April 11, 1997, Administrative Law Judge Steven M. Charno issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, the Charging Party Union filed an answering brief to the Respondent's exceptions, and the Respondent filed an answering brief to the General Counsel's exceptions and a reply brief to the Union's answering brief.

The National Labor Relations Board has delegated [*2] its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified, to modify the remedy, n1 and to adopt the recommended Order as modified. n2

----------Footnotes----------

n1 Although the judge provided a make-whole remedy for those unit employees who sustained losses in wages or benefits because the Respondent disciplined them pursuant to unlawfully implemented work rules, he failed to order in his remedy section the reinstatement of discharged employees Alejandro Gonzalez and Richard Martin although he included their reinstatement in his recommended Order. Accordingly, we modify the judge's remedy to direct that the Respondent offer Gonzalez and Martin immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

n2 The General Counsel has excepted to the judge's failure to include provisions in his recommended Order and notice directing that the Respondent rescind those unilateral changes that benefited the unit employees only on the Union's request and that the Respondent make whole any unit employees who sustained losses in wages or benefits because of the work rules that the Respondent unlawfully implemented. Because we find merit to these exceptions, we shall modify the remedy, Order, and notice accordingly.

----------End Footnotes---------- [*3]

We affirm the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to meet and bargain with the Union, by implementing its last offer, including new work rules, in the absence of a valid bargaining impasse, by bypassing the Union and dealing directly with a unit employee, and by refusing to process employees' grievances. Although we also agree with the judge that the Respondent further violated Section 8(a)(5) and (1) by disciplining employees pursuant to unlawfully implemented work rules, we specifically find that Alejandro Gonzalez' discharge and Adam Csongedi's suspension were unlawful for the reasons stated below. Additionally, for the reasons stated below, we reverse the judge and find that the Respondent did not further violate Section 8(a)(5) and (1) of the Act by terminating dues deductions for the unit employees upon contract expiration.

1. We agree with the judge, for the reasons stated in his decision, that the parties had not bargained to impasse before the Respondent unilaterally implemented changes in the unit employees' terms and conditions of employment. We note, as the judge did, that the Board in *Taft Broadcasting Co., 163 NLRB 475, 478 (1967),* **[*4]** enfd. sub nom. *AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968),* set forth a number of factors for determining whether impasse has been reached:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Another factor that is considered is the parties' demonstrated flexibility and willingness to compromise in an effort to reach agreement. See, e.g., *Wycoff Steel, 303 NLRB 517, 523 (1991).* After considering the relevant factors, the Board will find that an impasse existed at a given time only if there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *AFTRA v. NLRB, 395 F.2d at 628.*

In affirming the judge's finding that impasse was not reached in this case, we emphasize that, until the Respondent **[*5]** abruptly claimed that its "last, best and final offer" was on the table and would be implemented unilaterally if not accepted, both the Respondent and the Union had demonstrated considerable flexibility and willingness to compromise their

positions. Thus, as both the judge and our concurring colleague discuss in more detail, there had been movement on both sides concerning important subjects such as wages, benefits, and holidays, and the parties continued making concessions until the Respondent cut short that process.

The Respondent contends, however, that the union negotiators' response to its "last, best and final offer"--that the Respondent was not offering anything that the Union could recommend to the employees--establishes that the parties were at impasse. We are not persuaded. It is a commonplace that experienced negotiators make concessions cautiously and that negative initial reactions are later reconsidered in order to obtain an agreement. See, e.g., *PRC Recording Co., 280 NLRB 615, 635 (1986)*, enfd. *836 F.2d 289 (7th Cir. 1987); Builders Institute of Westchester County, 142 NLRB 126, 127 (1963);* **[*6]** *Louisville Plate Glass Co., 243 NLRB 1175, 1181 (1979)*, enfd. *657 F.2d 106 (6th Cir. 1981);* and *Chicago Typographical Union No. 16 v. Chicago Sun Times, 935 F.2d 1501, 1508 (7th Cir. 1991).* In the context of these negotiations--where the parties had been confronting difficult issues in a constructive manner--the Respondent's abrupt declaration that its most recent offer was "final" and would be implemented unilaterally if rejected was a surprising development. In that context, we regard the Union's response--that the Respondent was not offering anything that the Union could recommend--as an understandable expression of dissatisfaction with the position just taken by the Respondent. Such a response is not reasonably interpreted as a firm indication of the Union's unwillingness to negotiate further or make additional concessions.

The record also indicates that the parties did not have a contemporaneous understanding that they were at impasse. Indeed, during the last bargaining sessions, before the Respondent's presentation of its final offer, the parties had both made several concessions in elements **[*7]** of their proposals and counterproposals in order to facilitate coming to an agreement. Moreover, when the Respondent presented its final offer, the Union's attorney specifically stated that the parties were not at impasse and that the Respondent would act unlawfully if it implemented the offer. n3 Two days later, after the unit employees voted not to vote on the question of ratifying the Respondent's offer, the Union's negotiators asked the Respondent's negotiator to meet and continue bargaining. This conduct indicates that the Union realistically believed that further negotiations might produce agreement. Under these circumstances, an impasse cannot be found, because an impasse can exist only if *both* parties believe that they are "at the end of their rope." *PRC Recording Co., 280 NLRB at 635; Huck Mfg. Co.*

v. NLRB, 693 F.2d 1176, 1186 (5th Cir. 1982)("For a deadlock to occur, *neither party* must be willing to compromise"); and *Teamsters Local 639 v. NLRB, 924 F.2d 1078, 1084 (D.C. Cir. 1991)*

----------Footnotes----------

n3 Contrary to our concurring colleague, we find this statement to be clearly relevant to the issue of the parties' contemporaneous understanding concerning the status of negotiations

----------End Footnotes---------- [*8]

The Respondent cites *NLRB v. H&H Pretzel Co., 831 F.2d 650, 656-657 (6th Cir. 1987),* in support of its contention that the parties were at impasse. That case, however, is readily distinguishable from this one. In *H&H Pretzel*, the employer made clear to the union that it had to achieve significant labor cost savings in order to survive; for its part, the union not only had no intention of granting economic concessions but actually was demanding wage increases. The union asked for additional bargaining, but did not offer new proposals or indicate that it would be willing to compromise on any particular issues. In those circumstances, the court agreed with the Board that the union's expressed willingness to continue negotiations was a "mere token offer," made simply to delay the inevitable imposition of wage reductions, and that the union actually was unwilling to move from its earlier position.

In this case, by contrast, the record does not justify an inference that both parties were similarly committed to maintaining plainly irreconcilable positions. Rather, until the Respondent's threat to implement its proposals unilaterally if not accepted, both [*9] parties had demonstrated flexibility and willingness to compromise on a number of important issues. The Respondent's threat of unilateral implementation was not made at a time when there was no realistic possibility that continuation of discussion would have been fruitful. To the contrary, the Respondent declared that its most recent offer was its "final" offer only 1 day after making its first economic proposal. In that quite different context, it is understandable that the Union did not immediately respond to the Respondent's threat to implement its proposals unilaterally by offering specific new proposals or concessions. In short, in contrast to *H&H Pretzel*, where the parties clearly were deadlocked, here the Respondent's declaration of impasse was premature,

and the Union's request for further negotiations a reasonable attempt to reach agreement.

2. Regarding Gonzalez' discharge and Csongedi's suspension, the evidence shows that, on January 1, 1992, the Respondent issued work rules for the Cleveland, Ohio distribution center where it employs the unit employees. The second paragraph of this document states as follows:

Participating in any of [11 enumerated] activities will [*10] result in disciplinary action, including warnings, suspension or discharge, depending, on management's discretion, upon the circumstances surrounding the incident, the severity of the misconduct and the offending employee's past record.

These work rules remained in effect until the Respondent, effective September 22, 1995, n4 unlawfully changed some of them in the absence of a valid bargaining impasse.

----------Footnotes----------

n4 All dates are in 1995, unless otherwise noted.

----------End Footnotes----------

The Respondent, throughout the relevant events here, has utilized a four-step progressive disciplinary system which provides for a verbal warning, a written warning, suspension, and then discharge for successive infractions of its work rules. On October 10, following the Respondent's unlawful unilateral changes, Gonzalez received a verbal warning for missing scheduled overtime work under Work Rule 5 that the Respondent unlawfully implemented after declaring a bargaining impasse. This verbal warning, as the judge found, therefore violated Section 8(a)(5) and (1) of [*11] the Act.

On October 30, the Respondent issued Gonzalez a written warning for being out of his work area under a valid work rule that predated the Respondent's unlawful unilateral changes. After Gonzalez was unable to work scheduled overtime on December 28, he received a 6-day suspension on January 2, 1996, for violating new Work Rule 5. The Respondent's discipline again violated Section 8(a)(5) and (1). Thus, the only discipline that the Respondent could have lawfully imposed on Gonzalez for these

incidents was a verbal warning to Gonzalez for being out of his work area on October 30.

On December 29, before his suspension, Gonzalez refused direct orders by two supervisors to load two shipments on trucks. Gonzalez walked around the shipping dock for 15 minutes and then went to lunch. After lunch ended, Gonzalez reported a back injury and his supervisor drove him to a medical center. On January 12, the Respondent discharged Gonzalez, who had just completed his suspension, because he had violated Work Rules 2 and 4 on December 29, by hampering production and disobeying orders to do his job. Although some discipline was lawful as Gonzalez had violated work rules that preexisted the Respondent's [*12] unilateral changes, the judge concluded that the discharge should have been a written warning based on his finding that Gonzalez should have been only at the second step of the progressive disciplinary system. n5

----------Footnotes----------

n5 The Respondent, in contrast, would have viewed "discharge" as being the next step of progressive discipline for Gonzalez after he returned from his suspension.

----------End Footnotes----------

The evidence concerning the Respondent's discipline of Csongedi establishes that, on December 22, he received a verbal warning for deficient performance as an order filler. The Respondent issued Csongedi a written warning for the same offense on January 19, 1996. Based on these warnings, the Respondent placed Csongedi on probation and assigned him to an in-house quality control check. It is clear, however, that both warnings, as well as Csongedi's probation, violated Section 8(a)(5) because the Respondent disciplined this employee pursuant to an unlawfully implemented work rule, i.e., both warnings and probation were imposed pursuant to a quality [*13] standard implemented after the Respondent's declaration of impasse.

About the first week of March 1996, the Respondent assigned Csongedi to work as a quality control checker. The Respondent has a general policy of "salting" orders in order to determine whether quality control checkers will catch specific errors that the Respondent deliberately makes in customer's orders. When Csongedi discovered an error in a salted order on March 6, 1996, he told a fellow employee that he would let the matter slide

and not report the errors to supervision as required. Csongedi also failed to report errors in "salted" orders on three other occasions in March. In fact, during the entire time he spent in quality control, Csongedi never reported any errors in the orders he checked. On March 29, 1996, the Respondent gave Csongedi a 2-week suspension for filing falsified reports in violation of Work Rule 11 based on his failure to report the errors and his comments reported to management showing that he was intentionally failing to act. The Respondent's action was consistent with its thinking that Csongedi had progressed to the third step of the disciplinary system.

The judge found that the Respondent had [*14] properly disciplined Csongedi under its Work Rule 11. However, because the Respondent's earlier discipline of Csongedi was unlawful, the judge concluded that his suspension should have been a verbal warning under the progressive disciplinary system. The judge therefore found that the Respondent further violated Section 8(a)(5) by suspending Csongedi in these circumstances.

The Respondent argues, inter alia, in its exceptions that Gonzalez' discharge and Csongedi's suspension were lawful because it "was empowered to discharge employees for even one offense for violation of work rules." We find no merit in that argument, which reflects a misapprehension of the legal principles governing discipline alleged to violate Section 8(a)(5).

In *Great Western Produce, 299 NLRB 1004, 1005 (1990),* the Board held that the discipline or discharge of an employee violates Section 8(a)(5) if the employer's unlawfully imposed rules or policies were a factor in the discipline or discharge. The Board noted that the employer may avoid having to reinstate and pay backpay to employees who were subjected to such unlawful discipline if it can show that it would have taken the [*15] same action against the employee even in the absence of the unlawful rule or policy. *Id. at 1006.* Normally, such defenses are raised in compliance proceedings; however, when the employer presents its evidence concerning the remedy at the hearing on unfair labor practices, no further litigation is required. *Id. at 1005 fn. 10 and 1006-1007.* See also *Consec Security, 328 NLRB No. 171,* slip op. at 1-2 (1999).

Applying the principles of *Great Western Produce* to the facts of this case, we are satisfied that the General Counsel has established the Respondent's unlawfully imposed rules were a factor in the discharge of Gonzalez and the suspension of Csongedi, and that those disciplinary actions therefore violated Section 8(a)(5). We find that no further litigation

is required because the employer has presented its evidence concerning the remedy at the hearing on the unfair labor practices. Considering that evidence, we further find that the Respondent has failed to show that it would have discharged Gonzalez and suspended Csongedi regardless of whether it had previously taken unlawful discipline against [*16] them, and that a status quo ante remedy is therefore appropriate.

In finding the 8(a)(5) violation, we agree with the judge that the Respondent's unlawfully promulgated work rules contributed to its decisions to discharge Gonzalez and to suspend Csongedi. Although the judge found that discipline would have been warranted on both occasions, he also found that the discipline of both employees would have been less severe had they not previously been disciplined under the new and unlawful work rules.

The record amply supports the judge's findings. It is undisputed that the Respondent has a progressive disciplinary system that it routinely follows when disciplining employees. And at least some of the discipline that the Respondent issued to Gonzalez and Csongedi was unlawful because it was issued for violations of work rules that the Respondent had unlawfully imposed. It logically follows that the earlier unlawful discipline was a factor in both Gonzalez' discharge and Csongedi's suspension.

The reasonableness of that logical inference is strengthened by the evidence that, under its own work rules, the Respondent avowedly considers "the offending employee's past [work] record" before imposing [*17] discipline. The record strongly indicates that the Respondent scrupulously followed that policy with regard to both Gonzalez and Csongedi. Thus, under the Respondent's progressive disciplinary system, suspension is the penalty for a third infraction of work rules, and discharge is the penalty for the fourth infraction. Counting each employee's two previous unlawful warnings, Gonzalez was at the fourth step in the system when he was discharged and Csongedi was at the third step when he was suspended. We do not think that it was coincidence that, with regard to each employee, the Respondent meted out exactly the discipline called for under its progressive disciplinary policy. Rather, we conclude that the Respondent followed that policy and discharged Gonzalez and suspended Csongedi partly on the basis of their previous unlawful discipline. We therefore find that the General Counsel has established that the previous unlawful discipline was a factor in Gonzalez' discharge and Csongedi's suspension, and consequently that those actions violated Section 8(a)(5).

With respect to the appropriate remedy for these violations, we find that the Respondent has failed to demonstrate that it would [*18] have discharged Gonzalez for hampering production and disobeying orders to perform his job, and would have suspended Csongedi for falsifying documents, even in the absence of the earlier unlawful discipline. In so reasoning, we do not question the Respondent's assertion that it had the discretion to bypass progressive discipline and impose more severe discipline on employees, including suspension and discharge, for egregious violations of its work rules. n6 Rather, we find insufficient evidence to support the Respondent's contention that it departed from its progressive discipline system in the cases of Gonzalez and Csongedi.

----------Footnotes----------

n6 Contrary to the Respondent's argument, however, the judge's findings that the Respondent lawfully discharged Michael Hanobik for a "flagrant, insubordinate violation of Respondent's work rules," apparently without going through all the steps in its progressive disciplinary policy, does not require a finding that it discharged Gonzalez and suspended Csongedi in the same manner. The Respondent's action with regard to Hanobik shows only that it *could* impose harsher discipline than would be called for at any given step in the progressive disciplinary policy, not that it did so in the case of either Gonzalez or Csongedi. We also note that no exceptions were filed regarding the judge's finding that Hanobik's discharge did not violate the Act, and therefore that finding is not before us.

----------End Footnotes---------- [*19]

Regarding Gonzalez' discharge, the Respondent did not present any evidence that it ignored progressive discipline and immediately discharged other employees for infractions similar to Gonzalez'. The Respondent thus has not shown that it would have terminated Gonzalez for that conduct alone. n7

----------Footnotes----------

n7 See *Great Western Produce, 299 NLRB at 1007* (employees Steeves and Trujillo)

----------End Footnotes----------

Regarding Csongedi's suspension, the Respondent's warehouse superintendent, Brian Kidd, testified that the Respondent has suspended at least two other employees for falsifying documents under Work Rule II, as Csongedi did. However, the Respondent presented no specific evidence regarding those other suspensions, and Kidd later admitted that Csongedi falsified documents in a different manner from the other employees. Consequently, the Respondent has not shown that Csongedi's infraction was comparable to those for which it previously suspended employees for violating Work Rule 11.

Finally, as we have noted, the Respondent's [*20] stated policy is to consider an employee's past work record before imposing discipline. The existence of this policy further undercuts the Respondent's contention that it would have discharged Gonzalez and suspended Csongedi regardless of whether it had previously imposed unlawful discipline against them. For all of these reasons, we find that the Respondent has failed to establish that it would have terminated Gonzalez and suspended Csongedi without regard to its progressive disciplinary system. We therefore find it appropriate to order the Respondent to offer to reinstate Gonzalez, to rescind Csongedi's suspension, and to make both employees whole for the unlawful actions taken against them.

3. In finding that the Respondent violated Section 8(a)(5) and (1) by ceasing dues deductions on the unit employees' behalf after the collective-bargaining agreement had expired, the judge ignored well-established Board precedent in *Bethlehem Steel Co., 136 NLRB 1500 (1962)*, enf. denied on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615 (3d Cir. 1963)*, cert. denied *375 U.S. 984 (1964)*, [*21] and its progeny holding that an employer, on contract expiration, can lawfully discontinue the deduction of union dues that had been required under a dues-checkoff provision in the parties' labor agreement. Furthermore, subsequent to the judge's decision, the Board reaffirmed this principle in its recent decision in *Hacienda Resort Hotel & Casino, 331 NLRB No. 89 (2000)*. In short, an employer's checkoff obligation does not survive expiration of the collective-bargaining agreement. We therefore dismiss this complaint allegation.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusions of Law 3.

"3. By the following acts, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act: (a) refusing to meet and continue to bargain with the Union over the terms and conditions of a collective-bargaining agreement, (b) implementing its last offer absent an impasse in negotiations, (c) implementing new work rules absent an impasse in negotiations, (d disciplining employees Gonzalez, Dillon, Martin, and Csongedi pursuant to unlawfully implemented work rules, (e) by passing [*22] the Union and dealing directly with a unit employee, and (f) refusing to process employees' grievances.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cotter & Company, Westlake, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(f) and 2(l) from the Order, and reletter subsequent paragraphs accordingly.

2. Substitute the following for paragraph 2(b).

"(b) On the Union's request, cancel and rescind all terms and conditions of employment, including work rules and quality standards, unilaterally implemented on or after September 1, 1995, but nothing in this Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the unit employees without a request from the Union."

3. Substitute the following for paragraph 2(h).

"(h) Make whole unit employees, including Alejandro Gonzales, Richard Martin, and Adam Csongedi, for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct in the manner set forth in the remedy [*23] section of the judge's decision."

4. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 19, 2000

John C. Truesdale, Chairman

J. Robert Brame III, Member

tier), and 50 cents an hour in each year for employees hired on or before that date (top tier). The Union also had lowered its demand for monthly health and welfare payments to $ 205 monthly in the first year, $ 340 the second year, and $ 355 the final year. The Respondent's "final offer" included pay raises of 25 cents an hour more the first year and 15 cents an hour additional in each of the last 2 contract years for top tier employees, whereas lower tier employees would get raises of 30 cents per hour in each year of the contract, with an extra 5 cents an hour for both tiers if the contract was ratified by August 31, 1995. Regarding health and welfare contributions, the Respondent proposed monthly contributors of $ 252, $ 260, and $ 270 for each employee during the succeeding years of the 3-year agreement.

----------End Footnotes---------- [*25]

Based on the continuous movement by the parties on issues of importance to both sides during these contract negotiations, I conclude that the bargaining flexibility that the Respondent and the Union demonstrated here provided a basis for further contract negotiations. I do not believe that the parties had reached a contemporaneous understanding that additional bargaining would be futile after the parties had concluded the eighth bargaining session on August 29. It is conceiveable that the parties eventually would have reached an agreement on economic subjects and language issues if they had continued to meet and explore further tradeoffs that could have mutually assisted them in resolving their differences. The Respondent, as the asserting party here, had the burden to demonstrate that impasse had occurred. n3 I do not find that the Respondent has effectively shown that further movement by either side was an unlikely event in the present case. I do not view as dispositive the evidence that the Respondent's officials had decided on certain wage levels as a bottom line proposal before negotiations began and therefore included them as part of the Respondent's "last, best and final offer." [*26] For, in collective bargaining, as Judge Posner has observed, "after final offers come more offers," *Chicago Typographical Union, Local 16 v. Chicago Sun Times, 935 F.2d 1501, 1508 (7th Cir. 1991).* Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by, inter alia, improperly declaring a bargaining impasse and refusing to meet and bargain with the Union.

----------Footnotes----------

n3 See *North Star Steel Co., 305 NLRB 45 (1991)*, enfd. *974 F.2d 68 (8th Cir. 1992).*

----------End Footnotes----------

In reaching this conclusion, however, I do not rely on the judge's finding that the parties' negotiations did "not constitute the type of exhaustive negotiations which might prompt a finding of impasse." The evidence shows that the parties met for between 7 and 8 hours at the first two negotiating sessions and then for significant periods of time during their last six meetings. Thus, although I agree that further bargaining might have benefited the parties' as they [*27] endeavored to reach agreement in these circumstances, the judge's characterization of the duration of the parties' negotiations is immaterial to my analysis here.

I also place no reliance on the judge's conclusion that the Respondent's failure to provide requested information to the Union "reinforced" his finding that the parties had not reached a bargaining impasse. Although the Union requested information about the Respondent's work-week schedule proposal at the outset of bargaining and the Respondent did not provide this information until the seventh bargaining session, there is no showing in this record that the Respondent's failure to provide this information at an earlier point in the negotiations hindered bargaining.

In short, I find that no bargaining impasse existed in this case based on the parties' demonstrated flexibility in bargaining and their demonstrated willingness to move off their initial proposals. For these reasons, I join my colleagues and the judge in finding that the Respondent has not met its burden of showing that a valid bargaining impasse existed in this case. n4

----------Footnotes----------

n4 In so concluding, I stress that the self-serving statements made by the Union's attorney denying the existence of a bargaining of a bargaining impasse have no bearing on my finding.

----------End Footnotes---------- [*28]

J. Robert Brame III, Member

DISSENTBY: FOX (In Part)

DISSENT:

Member Sarah M. Fox, dissenting in part.

I join my colleagues in all respects but one. Unlike them, I would find, for the reasons expressed in Member Liebman's and my dissent in *Hacienda Resort Hotel & Casino, 331 NLRB No. 89 (2000),* that the Respondent violated Section 8(a)(5) of the Act when it unilaterally ceased deducting employees' union dues after the parties' collective-bargaining agreement expired.

Dated, Washington, D.C. July 19, 2000

Sarah M. Fox, Member

ALJ: STEVEN M. CHARNO

ALJ-DECISION:

DECISION

CHARNO, *Administrative Law Judge:*

In response to charges timely filed by Teamsters Local Union No. 293, International Brotherhood of Teamsters, AFL-CIO ("Union"), a Consolidated Complaint was issued on May 30, 1996, which alleged that Cotter & Company ("Respondent") had violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended ("Act"), by, *inter alia,* refusing to bargain in good faith with the Union and by unlawfully disciplining and discharging its employees. Respondent's Answer denies the commission of any unfair labor practice.

A hearing was held before me in Cleveland, Ohio on September [*29] 30-October 3, 1996. Simultaneous trial briefs were filed by the General Counsel, Union and Respondent under extended due date of December 20, 1996, and reply briefs were filed by the Union and Respondent under extended due date of January 10, 1997.

FINDINGS OF FACT

I. Jurisdiction

Respondent, a Delaware corporation with a place of business in Westlake, Ohio, is engaged in the manufacture and distribution of hardware to various True Value Hardware stores. Respondent, in the course of its business, annually purchases and receives goods valued in excess of $ 50,000 from outside Ohio. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of the Act.

The Union is admitted to be, and I find is, a labor organization within the meaning of the Act.

II. Alleged Unlawful Conduct n1

----------Footnotes----------

n1 Unless otherwise indicated, the findings of fact in this section are based on uncontroverted evidence.

----------End Footnotes----------

A. Contract Negotiations

The Union represents a unit of warehouse employees, as well as a unit [*30] of drivers, at Respondent's Westlake warehouse facility. The most recent collective bargaining agreement between the Union and Respondent covering the warehouse employees n2 expired on August 31, 1995. n3 Prior to that expiration, contract negotiations between the parties took place on eight occasions: July 20, 21, August 2, 3, 4, 23, 28 and 29. The Union's negotiating committee was headed by Business Representative Charles Smith and further consisted of attorney John Masters, Business Representative John Gerard, Stewards Russell Tegtmeir and David Gaum, and employees Rich Martin, Michael Hanobik and Adam Csongedi. Respondent was represented by attorney Wendell Provost, who acted as its chief spokesperson, and by three of the facility's managers: Warehouse Superintendent Brian Kidd, Supervisor Wayne McIntosh and Operations Manager Bill Livingston. n4

----------Footnotes----------

n2 It is admitted that the Union is the designated exclusive bargaining representative of employees in the following appropriate unit: all employees employed by Cotter & Company only at 26025 First Street, Westlake, Ohio

and the vicinity within a radius of fifty (50) miles, as Distribution Experts, Maintenance and Janitors. [*31]

n3 All dates hereinafter are 1995, unless otherwise indicated.

n4 Livingston first joined Respondent's bargaining committee at the August 2 session.

----------End Footnotes----------

After Provost made an opening statement on July 20, the Union set forth a complete contract proposal raising both economic and non-economic issues, and the parties began to discuss each of the items proposed by the Union. When they reached the Union's economic proposals, Provost indicated that Respondent wished to defer any discussion of economics until certain language issues were resolved. Citing competitive and customer relations concerns, Provost then made three language proposals: (1) six identified paid holidays would be converted to personal days, (2) the work week would consist of four consecutive ten-hour days or five consecutive eight-hour days, including Saturdays and Sundays, all at straight time and (3) a failure to work mandatory overtime would constitute a disciplinable work rule violation, rather than a less consequential infringement of Respondent's attendance policy. In contrast, the Union had initially proposed the addition of [*32] two paid holidays and sought to limit the number of hours an employee was required to work on days before or after a holiday. The Union requested additional information from Respondent concerning the latter's work week proposal. After six and a half hours of negotiation, the session closed with a tentative minor agreement over elimination of the existing grievance procedure's peer review provision.

During a six-hour session on July 21, the parties discussed each other's proposals but but did not raise economic issues. Respondent and the Union finalized their agreement on the elimination of peer review language in the grievance procedure and agreed that the term of the contract would be three years. The Union attempted to secure language that would eliminate any possibility of appealing arbitration awards, but Respondent rejected the proposal. The parties then agreed to further negotiations on August 2-4.

During the negotiating sessions on August 2, 3 and 4, the first two of which lasted between seven and eight hours, the parties did not discuss economic issues. They continued to discuss Respondent's holiday and work week proposals, but the Union's counteroffer of exchanging Martin [*33]

Luther King day for the day after Thanksgiving was rejected by Respondent. The Union indicated that it was not willing to accept a proposal that required its members to work both Saturday and Sunday at straight time. On August 2, the Union withdrew its proposals to (1) double the Union's jurisdiction under the contract and (2) reduce the probationary period for new employees. Respondent did not withdraw any of its proposals. On August 3, Respondent supplied cost data on its health plan proposal, but the proposal was not discussed. The parties took up work rule issues, Respondent stating that (1) it would not limit mandatory overtime and (2) supervisors only performed bargaining unit work when employees left early. The Union took the position that (1) the contract did not include work rules, (2) Respondent had a right to make and enforce reasonable rules and (3) the Union had a right to challenge the validity of such rules at arbitration. The parties tentatively agreed on overtime breaks at this session, but they were unable to reach agreement on Respondent's language proposals. On August 4, the parties continued to discuss the work week and holiday proposals, and the Union iterated [*34] its request for information concerning the former. Hanobik stated that the parties were at an impasse on the holiday proposal, whereupon Masters vehemently denied the existence of an impasse and requested a break. The session lasted approximately four hours.

On August 23, negotiations resumed with only Smith, Tegtmeir and Csongedi representing the Union. Provost reviewed and rejected the Union's outstanding proposals. He then stated that the parties were at an impasse on the language issues. Smith agreed that an impasse might exist with respect to non-economic issues but noted that the parties' positions could change when economic issues were considered. n5 Provost indicated that Respondent would make an economic proposal at the August 28 session.

----------Footnotes----------

n5 Smith's testimony concerning who first raised the question of impasse was not directly refuted by Provost. For this reason and based on the demeanor of the parties while testifying, I credit Smith's account.

----------End Footnotes----------

At the outset of the August 28 session, Masters unequivocally [*35] stated that no impasse existed because there had been movement by both sides and there were a "lot of points the Union was willing to move on." The Union then made a counteroffer to Respondent's August 23 proposal. After

the luncheon recess, Respondent made its first comprehensive economic proposal. Respondent's first wage proposal consisted of 20 cents an hour for the first year and ten cents an hour for each of the two ensuing years for employees hired after August 27, 1985 ("lower tier") and 20 cents an hour during each year of the contract for employees hired on or before August 27, 1985 ("top tier"). The Union had previously proposed (1) a general wage increase of 75 cents an hour during each year of the contract and (2) the elimination of the lower tier by equalizing lower and top tier wage levels over the three years of the contract. After hearing Respondent's wage proposal, the Union modified its position on wages and proposed (1) a general wage increase of 65 cents an hour in each year of the contract, (2) elimination of the lower tier over four years, (3) withdrawal of its demand for double time for overtime and (4) modification of its 401k proposal by deferring employee [*36] participation in Respondent's plan until the second year of the contract.

Non-economic issues were also discussed on August 28. Respondent revisited the previously agreed-upon issue of duration and proposed that the contract term be increased from 36 to 42 months. This proposal was rejected by the Union. Respondent then modified its holiday proposal by eliminating Memorial Day, leaving only three days to be converted from holidays to personal days. Respondent also supplied the information sought by the Union concerning the work week proposal. The Union altered its position and tentatively agreed to accept a work week (1) for employees handling outbound traffic which consisted of five eight-hour days or four ten-hour days with weekend work at straight time if Respondent would commit to a starting time for the four-day week and would agree to pay overtime for the sixth eight-hour day or fifth ten-hour day of each week, and (2) for employees handling inbound traffic which consisted of five eight-hour days or four ten-hour days with weekend work on a voluntary basis. After a caucus, Respondent returned to economic issues and made a wage offer of (1) 25 cents in the first and second years [*37] of the contract and 20 cents in the third year for the lower tier and (2) 25 cents in the first year, 15 cents in the second and ten cents in the third for the top tier. n6 With respect to its work week proposal, Respondent indicated that the first shift would begin for employees working a four-day week between 4:00 and 9:00 a.m. and the second shift, between 4:00 and 8:00 p.m. Finally, Respondent raised its offer for monthly contributions to the Union's Health and Welfare Plan from $ 220 to $ 252 per employee during the first year of the contract, with contributions in subsequent years to amount to no more than 75% of the cost of Respondent's plan.

----------Footnotes----------

n6 The apparent inconsistency between Respondent's wage and contract term proposals was not explained during the hearing.

----------End Footnotes----------

On the morning of August 29, the Union (1) made a wage counter-proposal for the top tier of 60 cents an hour in the first year of the contract and 55 cents in the final two years, (2) proposed eliminating the lower tier of wages over a five-year period, [*38] (3) reduced the amount of shift premium it was seeking, (4) modified its 401k proposal by deferring employee participation in the plan until the third year of the contract and (5) withdrew its mandatory overtime proposal. The Union stated that it needed further information on Respondent's work week proposal but was "willing to work . . . on some type of a different work week." Respondent thereafter modified its position in several significant respects: (1) its holiday proposal was restricted to the day after Thanksgiving, (2) proposed monthly Union Health and Welfare contributions were increased to $ 252 in the first year of the contract, $ 255 in the second and $ 260 in the third, with an employee option of enrolling in Respondent's health plan without providing evidence of insurability, (3) a contract term of three years and (4) 30 cent hourly wage increases during each of the first two years of the contract and 25 cents in the third for lower tier employees and 25 cents in the first year, 15 cents in the second and ten cents in the third for employees in the top tier.

During the afternoon session on August 29, the Union (1) abandoned its proposal to gradually eliminate the lower [*39] tier wage level, (2) withdrew its prior wage proposal and offered to accept a lower tier raise of 60 cents per hour in the first year, 70 cents in the second and 80 cents in the third and an hourly raise for top tier employees of 50 cents in each year of the contract, (3) reduced its shift premium demand by a nickel to 30 cents per hour, (4) lowered its demand for monthly Health and Welfare payments to $ 305 in the first year, $ 340 in the second and $ 355 in the third, (5) accepted Respondent's most recent holiday proposal on the condition that Martin Luther King day be made a personal day and (6) dropped its request for participation in Respondent's 401k plan. n7 After a caucus, Provost announced Respondent's "last, best and final offer": (1) lower tier employees would receive annual increases of 30 cents per hour while top tier employees would get 25 cents the first year and 15 cents in each of the last

two years with an additional five cents in the final year for both tiers if the contract was ratified by August 31--prior to the commencement of negotiations, Provost and his superiors agreed that this wage level was to be Respondent's "bottom line" offer, n8 (2) employees earning [*40] less than lower tier wages would be raised to that tier, (3) monthly Health and Welfare contributions would be raised to $ 252 in the first year, $ 260 in the second and $ 270 in the third and (4) prior proposals other than wages and Health and Welfare payments remained unchanged. Provost then stated for the first time that, if Respondent's final offer was not accepted by August 31, it would implement the offer and terminate dues checkoff, the deduction of initiation fees and the arbitration of grievances. Masters declared that no impasse existed and that Respondent would violate the Act if it implemented the offer. Provost left the room, indicating that he would be available for one hour to answer any questions concerning the offer. Five minutes later, Smith called Provost's room, but there was no answer. Smith then visited the front desk and was told that Provost had checked out.

----------Footnotes----------

n7 I credit Provost's testimony that, "eventually, they dropped the 401K, and said that they were more concerned with base wage increases."

n8 Provost credibly so testified.

----------End Footnotes---------- [*41]

On August 30, The Union negotiating team explained Respondent's offer to the unit employees who voted unanimously (1) not to vote on the question of ratification and (2) to strike. The latter vote was never effectuated. The following day, Smith and Masters telephoned Provost, informing him of the employees' refusal to accept the offer and asking him to meet and continue bargaining. Provost replied that "further meetings would not be worthwhile" since the Union had Respondent's final offer. On or about September 6, Respondent implemented its final offer and, as of September 1, revoked dues' checkoff, the collection of initiation fees and the arbitration of grievances. n9 Around September 10, the Union, unaware of Respondent's implementation, again attempted to recommence negotiations but Respondent refused to do so. Effective September 22, Respondent also implemented the following work rule changes: n10

3. Violating safety rules or safe work practices. *Failing to report any on the job injury the day the injury occurs.*

* * *

5. Leaving the designated work areas without specific authorization from a supervisor or pursuant to these rules except during break, lunch **[*42]** period, at the end of the shift *or assigned overtime period (whichever is later).*

----------Footnotes----------

n9 In a memorandum to employees dated September 8, 1995, Respondent indicated that it had implemented its final offer the preceding Wednesday, which was September 6th.

n10 Substantive changes from prior rules are italicized.

----------End Footnotes----------

General Counsel and the Union contend that (1) no impasse existed at the time Respondent terminated bargaining and (2) Respondent's implementation of its final offer was a refusal to bargain in good faith violative of Section 8(a)(5) of the Act. Respondent demurs. The Board articulated the standard by which this issue is to be resolved in *Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967), enf'd sub nom. AFTRA v. N.L.R.B., 395 F.2d 622 (D.C. Cir. 1968):*

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue **[*43]** or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Impasse cannot exist "until there appears to be no realistic possibility that a continuation of bargaining at the time would be fruitful." *AFTRA v. N.L.R.B., 395 F.2d at 628; Patrick & Co., 248 N.L.R.B. 390, 393 (1980), enf'd, 644 F.2d 899 (9th Cir. 1981).* Further, impasse as to a single issue does not terminate the parties' duty to bargain concerning other issues. *Patrick & Co., 248 N.L.R.B. at 392.* Respondent here bears the burden of

proving that impasse existed. *See Outboard Marine Corp., 307 N.L.R.B. 1333, 1363 (1992), enf'd, 9 F.3d 113 (7th Cir. 1993).*

Although the parties' bargaining history reveals a series of successfully concluded collective bargaining agreements, the first six sessions of the instant negotiations were characterized by Respondent's out-of-hand rejection **[*44]** of virtually all of the Union's proposals. Respondent's allocation of more time for the instant negotiations than was its usual practice when bargaining with the Union is probative of nothing more than the fact that the language changes sought by Respondent represented radical departures from the parties' previous agreements. In this context, eight bargaining sessions of average duration, especially where Respondent did not make an economic proposal until the penultimate session, do not constitute the type of exhaustive negotiations which might prompt a finding of impasse. *See Teamsters Local 639 v. N.L.R.B., 924 F.2d 1078, 1083-84 (D.C. Cir. 1991); Huck Mfg. Co. v. N.L.R.B., 693 F.2d 1176, 1186 (5th Cir. 1982); Patrick & Co., 248 N.L.R.B. at 393.* This finding is reinforced by the fact that Respondent did not supply information sought by the Union concerning the work week proposal until immediately prior to making its final offer. *See Microdot, Inc., 288 N.L.R.B. 1015, 1016 (1988); Pertec Computer Corp., 284 N.L.R.B. 810, 812 (1987).* **[*45]**

The issues as to which disagreement existed at the time Respondent terminated negotiations were of exceptional importance to both parties, but the record does not support Respondent's argument that, "despite the parties' best efforts, neither party [was] willing to move from its respective position." n11 Both Respondent and the Union demonstrated flexibility and movement of position during the last two negotiating sessions. *See Wycoff Steel, Inc., 303 N.L.R.B. 517, 523 (1991); J. Josephson, Inc., 287 N.L.R.B. 1188, 1190 (1988).* The only evident inflexibility was that of Respondent's representatives who lacked authority to bargain further concerning wages after making their final offer. *See Lloyd A. Fry Roofing Co. v. N.L.R.B., 216 F.2d 273, 275 (9th Cir. 1954); Wycoff Steel, Inc., 203 N.L.R.B. at 525.*

----------Footnotes----------

n11 Post-Hearing Brief of Respondent Cotter & Company at 28.

----------End Footnotes----------

The contemporaneous understanding [*46] of both parties as to the state of negotiations does not demonstrate the existence of an impasse. When employee representatives on the Union negotiating committee opined on August 3 that an impasse had been reached on the isolated issue of Respondent's holiday proposal, their statement was immediately disavowed by the Union's attorney. Thereafter, the parties bargained further concerning the issue, each making concessions in search of agreement. This behavior negates any possible inference of impasse on the holiday issue. See *Gulf States Mfg., Inc. v. N.L.R.B., 704 F.2d 1390, 1399 (5th Cir. 1983); Good GMC, Inc., 267 N.L.R.B. 583, 585 (1983); Pillowtex Corp., 241 N.L.R.B. 40, 46 (1979).* While the parties agreed on August 23 that an impasse might exist as to certain language issues, there was the explicit possibility that the parties might subsequently resolve those issues during the discussion of economic proposals. *See Korn Inds., Inc. v. N.L.R.B., 389 F.2d 117, 121 (4th Cir. 1967).* Finally, Respondent's self-serving declaration of impasse on August 29 was [*47] immediately and forcefully rejected by the Union, which thereafter repeatedly attempted to reopen negotiations.

For the foregoing reasons, I conclude that Respondent did not demonstrate that an impasse existed at the time it stopped bargaining on August 29. Accordingly, I conclude that Respondent's implementation of its final offer before negotiations reached an impasse was a unilateral modification of the terms and conditions of employment under negotiation in violation of Section 8(a)(5) of the Act. *See N.L.R.B. v. Katz, 369 U.S. 736, 743 (1962); Wycoff Steel, Inc., 303 N.L.R.B. at 523; Taft Broadcasting Co., 163 N.L.R.B. at 478.* Work rules, especially those involving the imposition of discipline, constitute a mandatory subject of bargaining, and Respondent's unilateral implementation of such rules without bargaining to impasse also violated Section 8(a)(5) of the Act. *See Ciba-Geigy Pharmaceuticals Div., 264 N.L.R.B. 1013, 1016 (1982), enf'd, 722 F.2d 1120, 1126-27 (3d Cir. 1983).*

B. Michael Hanobik

Hanobik had been employed [*48] by Respondent for seven years and was a second-shift receiver at the time of his October 6 discharge. He was also a member of the Union negotiating committee and had been the acting second-shift Steward for 4-1/2 years. n12 On or immediately prior to September 27, Supervisor Jim Davis spoke with Hanobik about disturbing the 11:00 p.m. "morning meeting" at the beginning of the third shift and told

the latter not to do so in the furture. Hanobik left work early on September 27 but returned at the commencement of the third shift. Upon arriving, he (1) entered the "morning meeting" without first checking in with the security guard, (2) shouted several times "Don't sign that goddamn bid. The company is trying to fuck you." (3) refused to leave when asked to do so by Supervisors Davis and Rick Ellis, (4) said "fuck you" to Supervisor Davis, (5) left the building after approximately eight minutes and (6) was not shown to have spoken directly with a single third-shift employee. At the close of an investigatory meeting held by Respondent the following day, Hanobik was suspended. After another investigatory meeting on October 6, he was discharged. Hanobik thereafter filed a discharge grievance [*49] which was not acted upon by Respondent.

----------Footnotes----------

n12 I find Hanobik's prior discharge and reinstatement, which were discussed by General Counsel on brief, to be without demonstrated relevance or probative value with respect to the issue before me.

----------End Footnotes----------

General Counsel argues that Hanobik was entitled, as a Union steward, to return to the facility in order to answer employee questions concerning a bidding process then under discussion by the work force. Given the above findings, as well as Hanobik's admission of the salient features of the conduct attributed to him, I find that (1) General Counsel's argued rationale is without record support and (2) Hanobik was discharged because of his flagrant, insubordinate violation of Respondent's work rules and not as a result of his Union activities. n13 *See Charles Meyers & Co., 190 N.L.R.B. 448, 449 (1966).*

----------Footnotes----------

n13 Even if General Counsel had made a *prima facie* showing, I would be forced to conclude that Respondent would have discharged Hanobik for conduct wholly unrelated to his concerted protected activities. *See gen. N.L.R.B. v. Transportation Management Corp., 462 U.S. 393 (1983).*

----------End Footnotes----------

[*50]

C. Alejandro Gonzalez

Gonzalez loaded trucks in Respondent's shipping department for 18 months. He received an October 10 n14 verbal warning under Respondent's progressive disciplinary system for missing scheduled overtime under newly implemented Work Rule 5. On October 30, Respondent issued Gonzalez a written warning for being out of his work area. n15 On December 28, Gonzalez was unable to work scheduled overtime and, on January 2, 1996, he was given a six-day suspension for violating new Work Rule 5.

----------Footnotes----------

n14 The dates of Gonzalez's discipline are drawn from his January 2, 1996 disciplinary notice.

n15 This discipline was administered pursuant to the portion of Work Rule 5 which had been in effect before Respondent unilaterally implemented work rule changes.

----------End Footnotes----------

On December 29, Supervisor Linda Hall assigned two shipments weighing approximately 27,000 pounds to Gonzalez and advised him of the fact. Gonzalez indicated that he would rather do a lighter load, and Hall gave him a direct order to load the assigned shipments. **[*51]** When Gonzalez refused, Supervisor Frank Matus ordered him to do the assigned loads. Gonzalez again refused and said he wanted to speak with Kidd or Livingston. Hall stated that neither was in the facility and, at McIntosh's suggest, told Gonzalez to load the assigned shipments and talk with Kidd or Livingston the following Monday. Gonzalez did not return to work but walked around the shipping dock for 15 minutes and then went to lunch. n16 After the lunch hour, Gonzalez reported a back injury, was driven by his supervisor to a medical center, diagnosed as having aggravated a herniated disc and released from work until January 2, 1996. On January 12, Respondent discharged Gonzalez for violating its work rules on December 29 by hampering production and disobeying orders to do his job. Gonzalez's subsequently-filed grievance was not processed by Respondent.

----------Footnotes----------

n16 Findings concerning the events of December 29 are based on Hall's credible, uncontroverted testimony; Gonzalez could not recall what occurred on the morning of December 29.

----------End Footnotes---------- [*52]

Gonzalez's verbal warning and suspension for not working scheduled overtime under Respondent's unlawfully implemented Work Rule 5 are plainly invalid. *See Ciba-Geigy Pharmaceuticals Div., supra.* Gonzalez was discharged pursuant to Respondent's system of progressive discipline which provides for a verbal warning, a written warning, suspension and then discharge. n17 Because some of the discipline meted out to Gonzalez was unlawful, his written warning should have been a verbal one and his discharge should have been a written warning. I therefore conclude that his warnings, suspension and discharge were violative of Section 8(a)(5).

----------Footnotes----------

n17 Respondent's system is outlined on its disciplinary notice forms.

----------End Footnotes----------

D. Matthew Dillon

Dillon worked for Respondent for four years and two months before he was discharged on December 7. He was a member of the Union but did not otherwise represent it. n18 On September 28 and October 28, Dillon refused to work scheduled overtime for which he received, respectively, [*53] an October 3 verbal warning and a November 2 written warning for violating Respondent's newly implemented Work Rule 5. On November 7, Respondent suspended Dillon for one week for refusing to work scheduled overtime on November 3. n19 Dillon filed a grievance over his suspension. After the suspension had elapsed, Kidd contacted Dillon and told him that (1) the discipline had been a mistake, (2) to report back to work and (3) he would be paid for the missed week. n20 When Dillon returned to work, he was assigned to the first shift because he had not signed a bid sheet for the second shift which he preferred. The shift bid sheet was posted prior to and during Dillon's suspension. Dillon's attempts to transfer back to the second shift were rejected by Respondent. On December 7, Respondent discharged Dillon for excessive absences under the company's no-fault attendance

policy. Neither the validity of the attendance policy nor Dillon's contravention of it are contested. n21 Dillon filed a grievance over his discharge, which is still pending.

----------Footnotes----------

n18 On brief, General Counsel contends that anti-Union animus was demonstrated because Respondent could have known that Dillon was Hanobik's "best friend." Given General Counsel's failure to demonstrate animus in connection with Hanobik's discharge, I find the contention concerning Dillon to be of little relevance. [*54]

n19 The findings concerning Dillon's discipline are based on Respondent's disciplinary action notices.

n20 On brief, General Counsel asserts that Respondent violated Section 8(a)(5) of the Act by settling Dillon's grievance without first discussing the matter with the Union. General Counsel concedes that this matter was not alleged in the Consolidated Complaint but maintains that it was fully litigated. Given Respondent's admission that no grievances were processed in the manner set forth in old collective bargaining agreement and the fact that Respondent's reply brief did not voice an objection to General Counsel's assertion, I will permit amendment of the Consolidated Complaint to conform to the proof adduced at the hearing.

n21 While there is a self-serving, unsworn allegation of disparate treatment in Dillon's discharge grievance, I find that the record does not contain substantial probative evidence of disparate treatment given General Counsel's failure to proffer Respondent's attendance records.

----------End Footnotes----------

Dillon's warnings pursuant to Respondent's unlawfully implemented Work Rule 5 are clearly [*55] invalid and violative of Section 8(a)(5). *See Ciba-Geigy Pharmaceuticals Div., supra.* There is no evidence of animus in relation to Dillon's assignment to the first shift. Based on Respondent's credibly asserted reason for the assignment and the absence of any cogent explanation of Dillon's failure to file a shift bid, I reject General Counsel's contention that this assignment was discriminatory. General Counsel argues on brief that the absences which caused Dillon's discharge were due to his being unlawfully assigned to the first shift. Given my conclusion that

Dillon's shift assignment was lawful, I reject General Counsel's argument and conclude that Dillon's discharge was not shown to be improper.

E. Richard Martin

Martin filled orders in Respondent's shipping department. He had been a member of the Union's negotiating committee for six months when he was terminated on February 20, 1996. During September, Respondent gave Martin a verbal warning for failing to work scheduled overtime in violation of its newly implemented Work Rule 5. Martin received an apparently uncontested written warning in November. In December, Martin was suspended for being [*56] out of his work area. n22 Martin's grievance concerning his suspension was never acted upon by Respondent. On February 20, 1996, Respondent terminated Martin for being out of his work area. Martin filed a grievance over his termination, which is still pending.

----------Footnotes----------

n22 This discipline was imposed under the part of Work Rule 5 which had been in effect before Respondent unilaterally implemented work rule changes.

----------End Footnotes----------

Martin's verbal warning pursuant to Respondent's unlawfully implemented Work Rule 5 violates Section 8(a)(5). *See Ciba-Geigy Pharmaceuticals Div., supra.* Martin was concededly discharged under Respondent's system of progressive discipline which provided for a verbal warning, a written warning, suspension and then discharge. n23 Because the initial discipline meted out to Martin was unlawful, Martin's written warning should have been a verbal one, his suspension should have been a written warning and his discharge should have been a suspension. Accordingly, I conclude that his discharge [*57] was tainted by Respondent's earlier, unlawful discipline and is violative of Section 8(a)(5).

----------Footnotes----------

n23 Post-Hearing Brief of Respondent Cotter & Company at 43.

----------End Footnotes----------

F. Adam Csongedi

Csongedi has been employed by Respondent since 1989. As relevant here, he served as a Union Steward and member of the Union's negotiating committee. On December 22, he received a verbal warning for deficient performance as an order filler. On January 19, 1996, Respondent gave him a written warning for the same reason. As a result of his warnings, Csongedi was placed on probation and assigned to an in-house quality check for several weeks. Both warnings and probation were imposed pursuant to a quality standard implemented after August 31 under Article VII of the old collective bargaining agreement which gave Respondent the right to use its rule-making authority to establish quality and productivity standards. This unilateral modification of work rules in the form of quality standards and the resulting imposition of discipline on Csongedi are violations **[*58]** of Section 8(a)(5). *See Ciba-Geigy Pharmaceuticals Div., supra.*

Csongedi successfully completed the quality check program and was assigned as a quality control checker no later than the first week of March 1996. The process involved in quality checking is a direct reversal of the process involved in order filling, Csongedi's former position; and the "Quality Control Guidelines," which set forth details concerning the process, were prominently posted near his work station. At the outset of his new duties, Csongedi was trained by Donna Parsons, a fellow employee and Union member. Respondent has a general policy of "salting" orders, that is, placing errors in specific orders to see if the quality checkers catch them. Csongedi was given salted orders on March 6, 19, 21 and 28, 1996. When Csongedi discovered the March 6 error, he told Parsons that he would let the matter slide and not report the errors to supervision as required. n24 During his tenure as a quality checker, Csongedi never reported an error. Based on his failure to report the errors in the salted orders and his comments to Parsons, Respondent suspended him on March 29, 1996 for a two-week **[*59]** period for filing falsified reports in violation of Work Rule 11. Csongedi's grievance concerning his suspension was never acted upon by Respondent. Based on the foregoing findings, I conclude that Csongedi should have been disciplined for violating Work Rule 11. Because the initial discipline given Csongedi under Respondent's progressive disciplinary system was unlawful, Csongedi's suspension should have been a verbal warning. I therefore conclude that his suspension was tainted by Respondent's earlier, unlawful discipline and is violative of Section 8(a)(5).

----------Footnotes----------

n24 Parsons credibly so testified.

----------End Footnotes----------

On March 15, 1996, Supervisor Brian Dunlap issued an overtime call. n25 Subsequently, Dunlap walked out of an office and unintentionally collided with Csongedi. Because Csongedi was away from his work area, Dunlap asked where Csongedi had been. Csongedi told Dunlop to keep his distance, and the latter repeated his question. Csongedi asked to see Kidd or Livingston and, when told they were gone for the day, asked for Union representation. [*60] Dunlop replied that there was no need for the Union and reiterated his question. Csongedi stated "I'm gone" and Dunlop said that, if Csongedi left, it would be considered a "walk-off." Csongedi then spoke with Union Steward Tegtmeier who instructed Csongedi to return to work. Although Respondent did not impose any discipline, Csongedi filed a grievance concerning the encounter which is still pending. n26 Based on the foregoing, I conclude that (1) no investigatory interview took place and Csongedi was therefore not entitled to Union representation and (2) the alleged assault did not occur.

----------Footnotes----------

n25 General Counsel's attempt to characterize the timing of this call as unusual is not supported by the record.

n26 The findings concerning the encounter between Csongedi and Dunlap are based on the latter's detailed, consistent testimony, which I credit over Csongedi's inherently improbable account. Csongedi testified that he was unsure of the date of the encounter but believed that it took place a week before he became a quality checker. When I asked counsel for the General Counsel to clarify the date, he was unable to do so although it would appear that Csongedi's grievance would have conclusively determined the date. For the foregoing reasons, I credit Dunlap's explanation of why he believed the encounter occurred on March 15. Accordingly, there is no support for General Counsel's argument that the encounter was a cause for Csongedi's assignment a quality checker.

----------End Footnotes----------

[*61]

G. Grievances and Dues

The final allegations of the Consolidated Complaint to be addressed are that Respondent has, since the beginning of September, unlawfully (1) refused to process grievances and (2) stopped deducting Union dues on behalf of unit employees. Respondent's refusal to deduct dues is not contested and the findings appearing above demonstrate that Respondent has repeatedly failed to process employee grievances as required by the parties' most recent collective bargaining agreement. It is well established the expiration of a collective bargaining agreement does not relieve an employer of a contractual duty to process grievances. *E.g., Days Hotel of Southfield, 311 N.L.R.B. 856, 862 (1993).* There is no dispute in this case that the contract's formal grievance and arbitration process was terminated when the contract expired, but Respondent maintains that it remained willing to "discuss" any matter which might have been grieved under the old procedure. Based on the foregoing findings, I conclude that Respondent's refusals to deduct dues and process grievances were unilateral modifications after the expiration of a collective bargaining agreement [*62] but before completing negotiation of a new agreement. Both refusals violate Section 8(a)(5) of the Act. *See Laborers Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 n.6 (1988).*

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts, Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act: (a) refusing to meet and continue to bargain with the Union over the terms and conditions of a collective bargaining agreement, (b) implementing its last offer in the absence of an impasse in negotiations, (c) implementing new work rules absent an impasse in negotiations, (d) disciplining employees Gonzalez, Dillon, Martin and Csongedi pursuant to unlawfully implemented work rules, (e) bypassing the Union and dealing directly with a unit employee, (f) discontinuing dues deductions of its employees and (g) refusing to process grievances.

4. Respondent's unfair labor practices affect commerce within the meaning of [*63] Section 2(6) and (7) of the Act.

5. The preponderance of the evidence does not indicate that Respondent has otherwise violated the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease those practices and to take certain affirmative action designed to effectuate the policies of the Act. Respondent will be ordered to (a) on request, bargain with the Union, (b) restore the *status quo ante* by rescinding its unilateral modifications of the terms and conditions of employment and (c) make whole any employees in the unit who sustained losses in wages or benefits because of Respondents' unlawful conduct. Such amounts shall be computed as prescribed in *F. W. Woolworth Co., 90 N.L.R.B. 289 (1950),* plus interest as computed in *New Horizons for the Retarded, 283 N.L.R.B. 1173 (1987).*

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended: n27

----------Footnotes----------

n27 If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

----------End Footnotes---------- [*64]

ORDER

Respondent, Cotter & Company, Westlake, Ohio, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to meet and bargain in good faith over the terms and conditions of a collective bargaining agreement with Teamsters Local Union No. 293, International Brotherhood of Teamsters, AFL-CIO (Union), as the exclusive bargaining representative of the employees in the following unit: all employees employed by Respondent only at 26025 First Street, Westlake, Ohio and the vicinity within a radius of fifty (50) miles, as Distribution Experts, Maintenance and Janitors.

(b) Implementing its last offer before the parties have reached an impasse in negotiations.

(c) Implementing new work rules and quality standards before the parties have reached an impasse in negotiations.

(d) Disciplining employees pursuant to unlawfully implemented work rules.

(e) Bypassing the Union and dealing directly with a unit employee.

(f) Unlawfully discontinuing dues deductions on behalf of its employees.

(g) Unlawfully refusing to process grievances.

(h) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed [*65] them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate policies of the Act:

(a) On request, bargain in good faith with the Union as the exclusive bargaining representative of employees in the above-described appropriate unit with respect to the terms of a collective bargaining agreement and, if an understanding is reached, embody it in a signed agreement.

(b) Cancel and rescind all terms and conditions of employment, including work rules and quality standards, unilaterally implemented on or after September 1, 1995.

(c) Cancel and rescind employee Alejandro Gonzalez's October 10, 1995 verbal warning and his January 2, 1996 suspension; and reduce Gonzalez's October 30, 1995 written warning to a verbal warning and his January 12, 1996 discharge to a written warning.

(d) Cancel and rescind employee Matthew Dillon's October 3, 1995 verbal warning, his November 2, 1995 written warning and his November 7, 1995 suspension.

(e) Cancel and rescind employee Richard Martin's September 1995 verbal warning; and reduce Martin's November 1995 written warning to a verbal warning, his December 1995 suspension to a written warning and his February 20, 1996 discharge [*66] to a suspension.

(f) Cancel and rescind employee Adam Csongedi's December 22, 1995 verbal warning, his January 19, 1996 written warning and his January 1996 quality probation; and reduce his March 29, 1996 suspension to a verbal warning.

(g) Offer Alejandro Gonzalez and Richard Martin immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(h) Make whole Alejandro Gonzalez, Richard Martin and Adam Csongedi for any loss of earnings and other benefits suffered as a result of Respondent's unlawful behavior, in the manner set forth in the "REMEDY" section of this Decision.

(i) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline set forth in subparagraphs (c) through (f), and within 3 days thereafter notify each of the affected employees in writing that this has been done and that the discipline will not be used against them in any way.

(j) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, [*67] social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(k) Process all outstanding and future employee grievances.

(l) Make Union dues deductions on behalf of its employees.

(m) Within 14 days after service by the Region, post at its facility in Westlake, Ohio, copies of the attached notice marked "APPENDIX." n28 Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by Respondent's representative, shall be posted by Respondent and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees

and former employees employed by Respondent at any time since August 31, 1995.

----------Footnotes----------

n28 If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the two required notices which read "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

----------End Footnotes---------- [*68]

(n) Within 21 days after service by the Region, file with the Regional Director a sworn certification by a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Done at Washington, D.C., this 11th day of April, 1997.

Steven M. Charno, Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights,

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to meet and bargain in good faith over the terms and conditions of a collective-bargaining agreement with Teamsters Local Union No. 293, International Brotherhood of Teamsters, [*69] AFL-CIO (the Union) as the exclusive bargaining representative of the employees in the following unit:

All employees employed by us only at 26025 First Street, Westlake, Ohio and the vicinity within a radius of fifty (50) miles, as Distribution Experts, Maintenance and Janitors.

WE WILL NOT implement our last offer before the parties have reached a lawful impasse during negotiations and WE WILL NOT implement new work rules and quality standards before the parties have reached an impasse in negotiations.

WE WILL NOT discipline you pursuant to unlawfully implemented work rules.

WE WILL NOT bypass the Union and deal directly with you.

WE WILL NOT unlawfully refuse to process your grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as your exclusive bargaining representative with respect to the terms of a collective-bargaining agreement and, if an understanding is reached, embody it in a signed agreement.

WE WILL, on the Union's request, cancel and rescind all terms and conditions of employment, including work rules [*70] and quality standards, which we unlawfully implemented on or after September 1, 1995, but nothing in this Order is to be construed as requiring us to cancel any unilateral changes that benefited the unit employees without a request from the Union.

WE WILL (a) cancel and rescind Alejandro Gonzales' October 10, 1995 verbal warning and his January 2, 1996 suspension; and reduce Gonzalez' October 30, 1995 written warning to a verbal warning and his January 12, 1996 discharge to a written; (b) cancel and rescind employee Matthew Dillon's October 3, 1995 verbal warning, his November 2, 1995 written warning and his November 7, 1995 suspension; (c) cancel and rescind employee Richard Martin's September 1995 verbal warning; and reduce Martin's November 1995 written warning to a verbal warning, his December 1995 suspension to a written warning and his February 20, 1996 discharge to a suspension; and (d) cancel and rescind employee Adam Csongedi's December 22, 1995 verbal warning, his January 19, 1996 written warning and his January 1996 quality probation; and reduce his March 29, 1996 suspension to a verbal warning.

WE WILL, within 14 days from the date of the Board's Order, offer Alejandro [*71] Gonzalez and Richard Martin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole any unit employees, including Alejandro Gonzalez, Richard Martin, and Adam Csongedi, for any loss of earnings and other benefits they suffered as a result of our unlawful discipline, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Alejandro Gonzalez, Matthew Dillon. Richard Martin, and Adam Csongedi and WE WILL within 3 days thereafter, notify each of them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL process your outstanding and future grievances.

COTTER & COMPANY

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of [*72] the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to meet and bargain in good faith over the terms and conditions of a collective bargaining agreement with TEAMSTERS LOCAL UNION NO. 293, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO (UNION), as the exclusive bargaining representative of the employees in the following unit: all employees employed by us only at 26025 First Street, Westlake, Ohio and the vicinity within a radius of fifty (50) miles, as Distribution Experts, Maintenance and Janitors.

WE WILL NOT implement our last offer before the parties have reached a lawful impasse during negotiations and WE WILL NOT implement new work rules and quality standards before the parties have reached an impasse in negotiations.

WE WILL NOT discipline you pursuant to unlawfully implemented work rules.

WE WILL NOT bypass the UNION and deal directly with you.

WE WILL NOT unlawfully discontinue your dues deductions.

WE WILL NOT unlawfully [*73] refuse to process your grievances.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the UNION as your exclusive bargaining representative with respect to the terms of a collective

bargaining agreement, and, if an understanding is reached, embody it in a signed agreement.

WE WILL, on request by the UNION, cancel and rescind all terms and conditions of employment, including work rules and quality standards, which we unlawfully implemented on or after September 1, 1995.

WE WILL (a) cancel and rescind Alejandro Gonzalez's October 10, 1995 verbal warning and his January 2, 1996 suspension; and reduce Gonzalez's October 30, 1995 written warning to a verbal warning and his January 12, 1996 discharge to a written warning; (b) cancel and rescind employee Matthew Dillon's October 3, 1995 verbal warning, his November 2, 1995 written warning and his November 7, 1995 suspension; (c) cancel and rescind employee Richard Martin's September 1995 verbal warning; and reduce Martin's November 1995 written warning to a verbal warning, his December [*74] 1995 suspension to a written warning and his February 20, 1996 discharge to a suspension; and (d) cancel and rescind employee Adam Csongedi's December 22, 1995 verbal warning, his January 19, 1996 written warning and his January 1996 quality probation; and reduce his March 29, 1996 suspension to a verbal warning.

WE WILL, within 14 days from the date of the Board's Order, offer Alejandro Gonzalez and Richard Martin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Alejandro Gonzalez, Richard Martin and Adam Csongedi whole for any loss of earnings and other benefits resulting from their discipline, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Alejandro Gonzalez, Matthew Dillon, Richard Martin and Adam Csongedi, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL process [*75] your outstanding and future grievances.

WE WILL deduct UNION dues on your behalf.

COTTER AND COMPANY
(Employer)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1240 East 9th Street, Room 1695, Cleveland, Ohio 44199-2086, Telephone 216-522-3729.

TRUSERV CORPORATION, F/K/A COTTER & COMPANY, PETITIONER v. NATIONAL LABOR RELATIONS BOARD, RESPONDENT TEAMSTERS LOCAL UNION NO. 293, INTERVENOR

No. 00-1356

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

254 F.3d 1105; 2001 U.S. App. LEXIS 15103; 165 L.R.R.M. 2577; 143 Lab. Cas. (CCH) P11,040

April 19, 2001, Argued

July 6, 2001, Decided

SUBSEQUENT HISTORY:
[1]** As Amended on Grant of Rehearing August 17, 2001, Reported at: *2001 U.S. App. LEXIS 18759*

PRIOR HISTORY:
On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

DISPOSITION:
Petition Granted in part, Denied in part, and Remand in part.

COUNSEL:
Frank W. Buck argued the cause for petitioner. On the briefs were Mark V. Webber and Kenneth D. Schwartz. Kathy B. Houlihan entered an appearance.

Usha Dheenan, Attorney, National Labor Relations Board, argued the cause for respondent. With her on the brief were Leonard R. Page, Acting General Counsel, John H. Ferguson, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, and Charles Donnelly, Supervisory Attorney.

Basil William Mangano and John M. Masters were on the brief for intervenor Teamsters Local Union No. 293.

JUDGES:
Before: EDWARDS, Chief Judge, ROGERS and GARLAND, Circuit Judges. Opinion for the Court filed by Circuit Judge ROGERS.

OPINIONBY:
ROGERS

OPINION:

[*1109]

ROGERS, *Circuit Judge*: TruServ Corporation (formerly Cotter & Co.) petitions for review of a decision and order by the National Labor Relations Board. *See Cotter & Co., 331 N.L.R.B. No. 94* (July 19, 2000). TruServ challenges for lack of substantial evidence the Board's findings that it violated **[**2]** § 8(a)(5) and (1) of the National Labor Relations Act, *29 U.S.C. § 158*(a)(1), (5) (1998), when it implemented terms and conditions of employment prior to reaching a genuine bargaining impasse, disciplined unit employees pursuant to unilaterally implemented work rules, and refused to process employee grievances. TruServ also seeks reversal or modification of the Board's remedial order, which it maintains appears to be punitive because the order would provide a windfall to the Union's health fund for healthcare claims paid by the company. We grant the petition on the issue of impasse because the Board's findings on that issue are not supported by substantial evidence; hence we do not reach TruServ's alternative contention that the Union had waived the right to bargain on work rules. We deny the petition's challenge to the processing of grievances.

I.

TruServ Corporation manufactures and distributes hardware to various True Value Hardware stores. Teamsters Local **[**3]** 293 is the bargaining

representative for the warehouse unit employees at the Company's Westlake facility. n1 A collective bargaining agreement, effective September 1, 1991, was due to expire on August 31, 1995. On July 20, 1995, the Company and the Union began negotiating for a successor bargaining agreement. At the outset, the Company expressed its concerns with the facility's efficiency and productivity, namely, that sales from the Westlake facility had decreased at a higher rate than sales for the Company as a whole, and that errors in filling orders at the Westlake facility had increased significantly. n2 After the Company's opening statement, the Union submitted a complete contract proposal on both economic and non-economic issues. Consistent with its past negotiations with the Union, the Company deferred discussion of "economic" (wages) issues until the end of the negotiations period, and on July 21, the parties agreed on a three-year [*1110] term for the new agreement and on language for the employee grievance procedure. During the eight days of negotiations, n3 the key issues discussed were (1) holidays, (2) the workweek, workday schedule, (3) healthcare, and (4) wages.

n1 The warehouse unit includes order fillers, stock employees, shippers, receivers, certain maintenance positions, and a janitor. [**4]

2 According to testimony before the Administrative Law Judge, the Company anticipated that negotiations would be particularly difficult because the Company sought significant changes to address its concerns with efficiency and productivity; consequently, the Company asked to commence negotiations earlier than usual. The Company believed that it needed to expand the work week (thereby minimizing overtime) and to change the holiday schedule in order to respond to its members' demands for faster turnaround on orders. This was necessary because the Company's members, if dissatisfied, could buy products from another supplier. The Company also expressed concern about rising health care costs and sought to make its own health care program available. Prior to the commencement of negotiations, the Company set a "bottom line" for wage increases, opposing a large pay increase in part because of employees' sub-standard performance.

n3 The negotiations took place over a six week period, on July 20 and 21 and August 2, 3, 4, 23, 28, and 29.

A. Holidays. The Company initially proposed to convert [**5] certain contractual holidays (especially the day after Thanksgiving) to "personal days," which the employees could use at other times, so that the warehouse could remain open to process the high volume of orders. The Union initially proposed to add two holidays to the ten existing contractual holidays, and to limit overtime on the days before and after a holiday. The Union later reduced its demands to one additional declared holiday and proposed to abandon its overtime proposal for working on holidays if the Company agreed to make concessions on overtime. The Company rejected the Union's proposal, offering instead to convert four declared holidays to personal days. On August 29, the Company further modified its proposal to require the conversion of only one holiday--the day after Thanksgiving. The Union conditioned acceptance on the Company's agreement to declare an additional holiday (Martin Luther King Day) a personal day. The Company showed no willingness to accept this condition.

B. Workweek, Workday Schedule. The Company sought to implement a workweek, workday schedule that would shorten the turn-around time on receiving orders and allow it to deliver merchandise to its [**6] members in one day. The expiring agreement provided for a Monday through Friday schedule of five eight-hour days, and for time and onehalf on Saturdays and double time on Sundays. The Company proposed either a four-day, ten-hour or a five-day, eighthour week, with Saturdays and Sundays included as part of the regular work week (thus not requiring overtime). *See Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 8. The Union rejected this proposal; it opposed the idea of Saturdays and Sundays as ordinary workdays. On August 28, the Company modified its proposal; the new proposal called for a Sunday to Saturday workweek with either four ten-hour workdays or five eight-hour days; overtime would accrue after four ten-hour days at 1.5 times the base rate for the fifth and sixth days, and double time on the seventh day. The "four tens" and "five eights" shifts would be filled first voluntarily and then by shift in accordance with seniority and ability. In response to the Company's modifications, the Union offered the following proposal: For inbound work (i.e., receiving and stocking merchandise), four ten-hour days or five eight-hour days, with weekend work voluntary; for outbound [**7] work, five eight-hour days or four ten-hour days, with weekend work at straight time. The Company responded that it would pay time and one-half beyond eight hours for the

five eight-hour days, and beyond ten hours for the four ten-hour days, but refused to pay double time for the sixth day.

C. Health Care. The Company proposed that the Union abandon the Teamsters Fund and instead adopt the Company's health plan. The Union proposed to maintain the Teamsters Fund exclusively, with the Company paying the entire amount of cost increases to contributions to the Fund and eliminating employee co-payments. On August 28, the Company modified its offer, proposing inclusion of its plan as an option for employees. If employees **[*1111]** chose the Company plan, the Company would pay twenty-five percent of the cost; if employees opted to stay in the Teamsters Fund, the Company would pay a predetermined monthly contribution per employee in the first year, and 75% of the cost of the Company's health plan in the second year. Although the Company later increased this amount, the Union continued to propose higher monthly contributions and elimination of employee co-payments.

D. Wages. The Company **[**8]** had a two-tier, progressive wage structure: The bottom tier consisted of employees hired after August 27, 1985; the top tier was composed of employees hired before that date. The Union initially proposed a general increase of 75 cents per hour during each year of the contract; a merge of the two tiers by equalizing lower and top tier wage levels over the 3 years of the contract; and inclusion of employees in the Company's 401(k) program. *See Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 8. On August 28, the Company proposed a continued two-tier system, with an increase in bottom tier rates of 20 cents in each of the three years of the agreement, and an increase in top tier rates of 20 cents, 10 cents, and 10 cents in each of the three years, respectively. The Union counter-proposed a merge of the two tiers over four years; a general wage increase of 65 cents in each year of the agreement; and deferred employee participation in the Company's 401(k) program until the second year of the agreement. The Union also withdrew its earlier proposal for double-time payment for overtime. The Company counter-offered an increase in bottom tier rates of 25 cents, 25 cents, and 20 **[**9]** cents, and in top tier rates of 25 cents, 15 cents, and 10 cents in each year of the agreement. On August 29, the parties again modified their proposals. The Union proposed a top tier wage increase of 60 cents in the first year and 55 cents in the second and third years; a merge of the two tiers over a five-year period; a reduction in shift premium; and deferred employee participation in the Company's 401(k) plan until the third year of the agreement. The Union also abandoned its earlier proposal

to limit mandatory overtime. The Company counteroffered with wage increases of 30 cents, 30 cents, and 25 cents for the bottom tier, and 25 cents, 15 cents, and 10 cents for the top tier for the three years of the agreement. In response, the Union proposed maintaining the two-tier system in exchange for wage increases of 60 cents, 70 cents, and 80 cents over three years for the lower tier and 50 cents for each of the three years for the top tier. The Union also abandoned its request for employee participation in 401(k) plans and reduced its shift premium demand to 30 cents per hour, but its wage increase proposals remained over twice what the Company proposed.

In retrospect, the parties present [**10] conflicting accounts of the extent of progress in the negotiations, and of the degree to which the parties had exhausted their willingness to make further concessions. The Union points to statements by its spokesman that negotiations had advanced on a number of issues, including holidays, and to a statement by the Union's attorney at the outset of the August 28 session that no impasse existed because both parties had made concessions and there were a "lot of points the Union was willing to move on." *Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 8. The Company, on the other hand, points to statements indicating impasse in the key areas of negotiation: (1) a statement on August 4 by a member of the Union's negotiating committee affirming that there was an impasse at least as to holidays; (2) August 23 statements by both the Company and the Union that the [*1112] parties were at impasse on a number of "noneconomic" issues, including the Company's workweek, workday proposal; and (3) the Union's declaration upon receiving the Final Offer that there was nothing in the Final Offer that it could recommend to unit employees.

On August 29, the Company issued what it termed its "last, [**11] best, and final offer." For outbound work, the Company offered a workweek, workday schedule of four ten-hour or five eight-hour days, Monday through Friday, staffed first on a voluntary basis and then on a mandatory basis according to seniority and ability. Overtime in a four-day week would be paid at time and a half on the fifth and sixth days, and double time on the seventh day; overtime for the five-day workweek would be the same as under the expiring agreement. For inbound work, the Final Offer required four ten-hour or five eight-hour days Sunday through Saturday. Overtime for the five-day schedule would be time and one-half for the sixth day and double time on the seventh day. For the four-day week,

overtime would be the same as for outbound work. As to health care, the Final Offer included the Company's health plan as an option for unit employees, with monthly contributions by the Company of $ 252, $ 260, and $ 270 over the three years of the agreement. As to wages, the Company presented its "bottom line" proposal: an increase of 30 cents, 30 cents, and 30 cents for the bottom tier, and 25 cents, 15 cents, and 15 cents for the top tier. Prior proposals (other than wages and [**12] health care payments) remained unchanged. The Final Offer thus remained substantially similar to the Company's earlier proposals and its third wage proposal of August 29. The Final Offer provided that if the employees ratified the contract by August 31, they would receive an extra 5 cents in their wages for the third year. The Company stated that it intended to implement its Final Offer if it was not approved by August 31.

The Union objected to the Company's conclusion of impasse, stating through its attorney upon receipt of the Company's Final Offer that "no impasses existed and that [the Company] would violate the Act if it implemented the offer." *Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 9. The Union further stated that the Company's Final Offer contained nothing that the Union could recommend to the employees. *See id.* at 1-2. On August 30, the unit employees unanimously voted not to vote on the Final Offer and to strike; however, a strike never took place. On August 31, the Union informed the Company that its Final Offer was "not even dignified with a vote," and requested further meetings to continue bargaining. n4 The Company declined further meetings, [**13] stating that the Union had the Company's final offer, and the Union filed an unfair labor practice charge. n5

n4 The record does not indicate that the Union representative notified the Company of the areas in which the Union was willing to grant further concessions.

n5 The Union filed a second unfair labor practice charge on March 21, 1996. After the Board consolidated the Union's unfair labor practice charges, the Union filed an amended charge on April 3, 1996. A consolidated complaint was filed on May 30, 1996.

On September 6, 1995 the Company implemented its Final Offer, terminating the contractual grievance and arbitration procedure and the automatic deduction of union dues and initiation fees. On September 10, the Union sought to resume negotiations. On September 22, the Company implemented new work rules, and thereafter took disciplinary action [*1113] against four employees based, in part, on the new work rules. n6

n6 The four employees were Matthew Dillon, Alejandro Gonzalez, Richard Martin, and Adam Csongedi. Dillon received a verbal warning on October 3, 1995, a written warning on November 2, 1995, and a one-week suspension on November 7, 1995, for refusing to work scheduled overtime pursuant to amended Work Rule 5. *See infra* note 11. After he filed a grievance over the suspension, the Company informed Dillon, without the participation of the Union, that the suspension was a mistake and paid him for the time that he had lost. Dillon was subsquently fired for violating the Company's no-fault attendance policy; the ALJ found that this discharge was not improper. *See Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 11. Gonzalez, who was found to have violated amended Work Rule 5, received a verbal warning on October 10, 1995, a third-step suspension on January 2, 1996, and was discharged for subsequent work rule violations on January 12, 1996. Martin received a verbal warning in September 1995, and a written warning in November 1995, for failing to work scheduled overtime in violation of amended Work Rule 5. In December 1995, Martin was suspended for being out of his work area pursuant to a preimpasse portion of Work Rule 5, and was discharged on February 20, 1996, for again being out of his work area. Csongedi was suspended on March 29, 1996, for violating a quality standard under the expiring agreement; the prior verbal and written warnings that formed the basis of the suspension, however, were issued pursuant to post-impasse quality standards.

[**14]

Following a hearing, an Administrative Law Judge ("ALJ") found that the Company "did not demonstrate that an impasse existed at the time it stopped bargaining on August 29" because the parties' bargaining sessions

"[did] not constitute the type of exhaustive negotiations which might prompt a finding of impasse." *Cotter & Co., 331 N.L.R.B. No. 94, 2000 NLRB LEXIS 450,* slip op. at 10. The ALJ further found that the Company had unlawfully disciplined and discharged employees pursuant to unlawfully implemented work rules, bypassed the Union in dealing directly with an employee, and refused to process employee grievances. *See id.* at 9-12. The Board affirmed the ALJ's findings that the Company violated § 8(a)(5) and (1) "by refusing to meet and bargain with the Union, by implementing its last offer, including new work rules, in the absence of a valid bargaining impasse, by bypassing the Union and dealing directly with a unit employee, and by refusing to process employees' grievances." *2000 NLRB LEXIS 450,* *3, *Id.* at 1. n7

> n7 The Board also affirmed the ALJ's finding that the Company's discipline of two employees (Gonzalez and Csongedi) was unlawful because "the [Company's] unlawfully imposed [work] rules were a factor" in those disciplinary actions. *Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 3. The Board reversed the ALJ's conclusion that the Company violated § 8(a)(5) and (1) by refusing to deduct Union dues after expiration of the existing bargaining agreement. *See id.*, at 4.

[15]**

II.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." *29 U.S.C. § 158*(a)(5). Mandatory areas of collective bargaining include "wages, hours, and other terms and conditions of employment." *29 U.S.C. § 158*(d); *see also Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198, 115 L. Ed. 2d 177, 111 S. Ct. 2215 (1991); NLRB v. Katz, 369 U.S. 736, 742-43, 8 L. Ed. 2d 230, 82 S. Ct. 1107 (1962).* An employer violates this duty to bargain if, absent a final agreement or a bargaining impasse, he unilaterally imposes changes in the terms and conditions of employment. *See 29 U.S.C. § 158*(d); *Katz, 369 U.S. at 742-43; Taft Broad. Co., 163 N.L.R.B. 475, 478 (1967), petition for review denied sub nom. American Fed'n of Television & Radio* **[*1114]** *Artists v. NLRB, 129 U.S. App. D.C. 399, 395 F.2d 622, 624 (D.C. Cir. 1968).*

A bargaining impasse--which justifies an employer's unilateral implementation of new terms and conditions of employment--occurs [**16] when "good faith negotiations have exhausted the prospects of concluding an agreement," *Taft, 163 N.L.R.B. at 478,* leading both parties to believe that they are "at the end of their rope." *PRC Recording Co., 280 N.L.R.B. 615, 635; see also Teamsters Local 639 v. NLRB, 288 U.S. App. D.C. 121, 924 F.2d 1078, 1084 (D.C. Cir. 1991); American Fed'n of Television and Radio Artists, 395 F.2d at 628.* For an impasse to be found, the parties must "have reached 'that point of time in negotiations when [they] are warranted in assuming that further bargaining would be futile.'" *Wycoff Steel, Inc., 303 N.L.R.B. 517, 523 (1991)* (quoting *Patrick & Co., 248 N.L.R.B. 390, 393 (1980)).* Whether the parties have reached this point is a case-specific inquiry; "there is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations." *Dallas Gen. Drivers, Warehousemen and Helpers, Local 745 v. NLRB, 122 U.S. App. D.C. 417, 355 F.2d 842, 845 (D.C. Cir. 1966).* Among the factors that the Board considers in evaluating the existence of an impasse are [**17] "the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft, 163 N.L.R.B. at 478.* After weighing these factors, the Board will find an impasse if there is "no realistic possibility that continuation of discussions ... would have been fruitful." n8 *American Fed'n of Television and Radio Artists, 395 F.2d at 628.*

n8 An impasse does not "permanently relieve[ ] [the parties] of the duty to deal with each other." *NLRB v. McClatchy Newspapers, 296 U.S. App. D.C. 32, 964 F.2d 1153, 1164 (D.C. Cir. 1992).* As the court observed in *McClatchy Newspapers*, an "impasse is only a temporary deadlock or hiatus in negotiations, 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.' " *964 F.2d at 1165* (quoting *Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 70 L. Ed. 2d 656, 102 S. Ct. 720 (1982)* (internal citation omitted)); *see also Serramonte Oldsmobile, Inc. v. NLRB, 318 U.S. App. D.C. 153, 86 F.3d 227, 232 (D.C. Cir. 1996).*

[**18]

The Board concluded that "the parties had not bargained to impasse before the [Company] unilaterally implemented changes in the unit employees' terms and conditions of employment." *Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 1. In so finding, the Board "emphasized that, until the [Company] abruptly claimed that its 'last, best and final offer' was on the table and would be implemented unilaterally if not accepted, both the [Company] and the Union had demonstrated considerable flexibility and willingness to compromise their positions." *Id.* This, the Board observed, was evidenced by the parties' concessions in the immediately preceding bargaining sessions; the Union's statement, upon receiving the Company's final proposal, that the parties were not at impasse; and the Union's subsequent request for additional meetings. n9 *See id.* at 1-2. In the Board's view, these circumstances cast doubt on the Company's characterization of its August [*1115] 29 proposal as a "final offer" and indicated that "the parties did not have a contemporaneous understanding that they were at impasse." *Id.* at 2. The Board declined to consider the Union's conduct upon receiving the [**19] Company's August 29 proposal--specifically, the Union's statement that the Company was not offering anything that the Union could recommend to its employees--as indicative of the Union's final bargaining position. Rather, the Board characterized the Union's statement as "an understandable expression of dissatisfaction" with the Company's "abrupt declaration that its most recent offer was 'final' and would be implemented unilaterally if rejected." *Id.*

> n9 On appeal, the Board does not rely on the ALJ's findings, which the Company challenges, that the Company (1) rejected "out-of-hand" "virtually all of the Union's proposals" during the first six days of bargaining, (2) proposed language changes that were "radical departures" from the expiring agreement, (3) did not make an economic proposal until the penultimate bargaining session, and (4) did not give the Union information about its work week proposal until later in negotiations. *See id.* at 10.

The Company contends on appeal that the Board (and the ALJ) [**20] erred in interpreting the Company's good-faith bargaining n10 and consequent concessions immediately preceding its Final Offer as an

indication that the Final Offer was not truly final. The Company maintains that the Board ignored the record as a whole, which, in the Company's view, "would tell any experienced negotiator that the parties were at impasse." Br. for Petitioner at 32. The Board, on the other hand, contends that "the parties had made significant progress and demonstrated considerable flexibility on [key issues]," and that "no contemporaneous understanding of impasse by both sides existed, because the Union explicitly denied the existence of impasse and repeatedly requested the continuance of bargaining, which the Company refused." Br. for Respondent at 16.

n10 Neither the Board nor the ALJ found that the Company negotiated in bad faith. *See Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 1-2, 7-9.

The court has long recognized that "in the whole complex of industrial relations few **[**21]** issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a board which deals constantly with such problems." *American Fed'n of Television and Radio Artists, 395 F.2d at 627* (quoting *Dallas Gen. Drivers, 355 F.2d at 844-45).* Thus, the court ordinarily defers to the Board's fact-finding as to the existence of a bargaining impasse. *See Teamsters Local 639, 924 F.2d at 1083; Dallas Gen. Drivers, 355 F.2d at 844-45.* To do so, however, the court must be satisfied that the Board's findings are supported by substantial evidence on the record considered as a whole. *See 29 U.S.C. § 160*(e) (1998); *Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 95 L. Ed. 456, 71 S. Ct. 456 (1951); Serramonte Oldsmobile, Inc. v. NLRB, 318 U.S. App. D.C. 153, 86 F.3d 227, 233 (D.C. Cir. 1996); Teamsters Local 175 v. NLRB, 252 U.S. App. D.C. 125, 788 F.2d 27, 30 (D.C. Cir. 1986); American Fed'n of Television and Radio Artists, 395 F.2d at 627.* We hold that the Board's **[**22]** conclusion of no impasse fails to satisfy this standard because the Board's findings that the Company's Final Offer was not truly "final" and that neither party was at the end of its bargaining rope are not supported by substantial evidence.

First, nothing in the record negates the Company's classification of its August 29 proposal as its "last, best, and final offer." Indeed, the record demonstrates that the Company, which was facing economic exigencies, bargained in good faith, made substantial concessions, and ultimately

reached a point when it was simply unwilling to compromise further. Although merely labeling an offer as "final" is not dispositive, *see Teamsters Local 175, 788 F.2d at 31; Chicago Typographical Union v. Chicago Sun-Times, 935 F.2d 1501, 1508 (7th Cir. 1991),* the circumstances here are telling. On August 4, the Company advised the Union that when it **[*1116]** had reached the limits of its bargaining, it would call its final proposal its "last, best, and final" offer. Thus, unlike *Teamsters Local 175* and *Chicago Typographical Union*, where the employer set forth a number of offers, all of which it termed "final," the Company signaled **[**23]** to the Union that it would use this particular language only when it had reached its bargaining limit. Moreover, the Company's demonstrated good faith in bargaining--a *Taft* factor that the Board and the ALJ neglected to apply--leaves no grounds for rejecting the Company's characterization of its August 29 proposal as its Final Offer. The record evidence thus demonstrates that in the face of eight days of what were uniformly perceived as difficult negotiations, the Company engaged in the kind of good-faith, hard bargaining that characterizes impasse. *See Georgia-Pacific Corp., 305 N.L.R.B. 112, 121 (1991); Salinas Valley Ford Sales, 279 N.L.R.B. 679, 690 (1986); Seattle-First Nat'l Bank, 267 N.L.R.B. 897, 898-99 (1983), rev'd in part on other grounds, Seattle-First Nat'l Bank, 270 N.L.R.B. 389 (1984).*

The Board's refusal to accept the Company's Final Offer as truly "final" was not based on the record evidence; rather, the Board relied on its intuitive belief that, upon further bargaining, each side would have made additional concessions. The Board stated that "there had been movement on both sides concerning important **[**24]** subjects such as wages, benefits, and holidays, and the parties continued making concessions until the [Company 'abruptly'] cut off that process." *Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 1. This approach, however, is impermissible, for it amounts to an intervention by the Board in the parties' substantive negotiations. In *NLRB v. American National Insurance Co., 343 U.S. 395, 404, 96 L. Ed. 1027, 72 S. Ct. 824 (1952),* the Supreme Court observed that the Act's requirement of good faith bargaining "does not compel either party to agree to a proposal or require the making of a concession." Therefore, the Court held, "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *Id.; see also H.K. Porter Co. v. NLRB, 397 U.S. 99, 103, 25 L. Ed. 2d 146, 90 S. Ct. 821 (1970).* In short, the parties remain in control of their negotiations, and each party, not the Board, determines at what point it ceases to be willing to compromise. *See H.K. Porter Co., 397 U.S. at 103-04; NLRB v. McClatchy*

Newspapers, 296 U.S. App. D.C. 32, 964 F.2d 1153, 1163 (D.C. Cir. 1992). **[**25]** This is especially appropriate where, as here, the negotiations were conducted by experienced participants who were intimately familiar with the intricacies of the bargaining process and whose relationship spanned more than a decade.

Second, the record does not support the Board's conclusion that "the parties did not have a contemporaneous understanding that they were at impasse." *Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 2. *Taft* identifies "the contemporaneous understanding of the parties as to the state of the negotiations" as a "factor[ ] to be considered in deciding whether an impasse in bargaining existed." *Taft Broad. Co., 163 N.L.R.B. at 478.* "If either negotiating party remains willing to move further toward an agreement, an impasse cannot exist: the parties' perception regarding the progress of the negotiations is of central importance to the Board's impasse inquiry." *Teamsters Local 639, 924 F.2d at 1084.* A "contemporaneous understanding" as to impasse does not, however, require the parties to reach *mutual* agreement "as to the state of the negotiations"; rather, each party must independently, **[*1117]** and in good faith, **[**26]** believe that it is "at the end of [its] rope." *PRC Recording Co., 280 N.L.R.B. at 635.* An application of this *Taft* criterion, which the Board emphasized, reinforces, rather than negates, the existence of an impasse, because nothing in the record indicates that the Company had not bargained to its fullest capacity. Furthermore, the Union's "conduct" on which the Board relies--the Union's selfserving statement on August 29 that the parties were not at impasse and the Union's vacuous request on August 31 for additional meetings--is insufficient to demonstrate the Union's desire to pursue further negotiations.

Absent conduct demonstrating a willingness to compromise further, a bald statement of disagreement by one party to the negotiations is insufficient to defeat an impasse. A contrary result would render the "contemporaneous understanding" *Taft* factor meaningless. Similarly, a vague request by one party for additional meetings, if unaccompanied by an indication of the areas in which that party foresees future concessions, is equally insufficient to defeat an impasse where the other party has clearly announced that its position is final. Indeed, as the court **[**27]** noted in addressing the breaking of an impasse, "the Board itself has indicated that a party's 'bare assertions of flexibility on open issues and its generalized promises of new proposals [do not clearly establish] any change, much less a substantial change' in that party's negotiation position." *Serramonte, 86*

F.3d at 233 (quoting *Civic Motor Inns, 300 N.L.R.B. 774, 776 (1990)).* Even if in the pre-impasse context the Union does not have to offer "a substantial change" in its position, the Union's immediate and definitive rejection of the Company's Final Offer suggests circumstances not unlike those relied upon by the Board in *Seattle-First National Bank* in concluding that the contemporaneous understanding of the parties supported a finding of impasse. *See Seattle-First Nat'l Bank, 267 N.L.R.B. at 898-99.* In addition, the Union declined to submit the Final Offer to a vote of the unit employees. *See Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 9. Furthermore, although on notice as a result of the Company's earlier signal about the language it would use to identify its final offer, the Union at no time indicated **[**28]** that it was ready to move on any issue that the parties had discussed. Rather, the parties remained far apart on the issues of exceptional importance--wages, healthcare, holidays, and work week. *See Taft Broad. Co., 163 N.L.R.B. at 478.* Under the circumstances, the record evidence points to no conduct indicating the Union's belief that further negotiations would be fruitful. *Cf. Serramonte, 86 F.3d at 233.*

The Board distinguished *NLRB v. H & H Pretzel Co., 831 F.2d 650 (6th Cir. 1987),* on the ground that both the Company and the Union had indicated flexibility in the last two days of negotiations and thus were not "similarly committed to maintaining plainly irreconcilable positions." *Cotter & Co. 331 N.L.R.B. No. 94,* slip op. at 2. In *H & H Pretzel,* the employer had made clear to the union that it had to achieve substantial labor cost savings in order to survive. After three bargaining sessions, however, the union continued to insist on wage increases. *See 831 F.2d at 652, 656.* Notwithstanding the brief period of negotiations, the Sixth Circuit affirmed the Board's finding that "the union's expressed **[**29]** willingness to continue talks was a mere token offer" made simply to delay the inevitable imposition of wage reductions. *Id. at 656-57.* This characterization of the union's efforts was reinforced by the fact that "the union was on notice, prior to the last negotiation session, of the company's commitment to cutting labor costs [to address its financial concerns]." *Id.*

[*1118] In distinguishing *H&H Pretzel,* the Board ignored two marked similarities between the two cases. First, as in *H&H Pretzel,* the Company from the outset put the Union on notice that it sought to address significant concerns about competitiveness and productivity by substantially modifying the parties' bargaining agreement. *See supra* note 2. To this end, the negotiations period was lengthier than usual. As in *H&H Pretzel,* although

the parties demonstrated flexibility in bargaining, they remained far apart on significant issues. *See H&H Pretzel, 831 F.2d at 656-57.* Second, as in *H&H Pretzel*, "while the Union sought to continue talks, it did not offer a new proposal or indicate a willingness to compromise further on any specific issue." *Id. at 656.* **[**30]** Although bargaining proposals were exchanged, the Union resisted movement in the Company's direction. On the eighth day of negotiations, for example, the Union was continuing to ask for twice the wage increases that the Company was offering, despite the Company's position that employee inefficiencies did not warrant such increases. *See supra* note 2. Unlike *H&H Pretzel*, the Union refused even to submit the Company's Final Offer to the unit employees for a vote. *See 831 F.2d at 652.*

In view of this record evidence, the Board's focus on the abruptness of the Company's Final Offer, on the Union's surprise upon receiving it, and on possible future concessions by both parties misses the mark. *See Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 1-2; *see also Serramonte, 86 F.3d at 233.* The bargaining positions of the parties, as expressed by their experienced negotiators, indicate that the parties were at impasse.

III.

The Company also challenges the Board's findings on employee discipline and the processing of grievances, and the Board's remedial order. Regarding the implementation of new work rules, the Company contends **[**31]** that the Union waived its right to bargain on work rules when it conceded that, in accord with the expired Agreement, the Company had the authority to implement new rules, and that the Union's sole remedy was to initiate grievance proceedings. n11 *See NLRB v. United States Postal Service, 303 U.S. App. D.C. 428, 8 F.3d 832, 836-37 (D.C. Cir. 1993); Haddon Craftsman, 300 N.L.R.B. 789, 790-91 (1990); Jim Walter Res., Inc., 289 N.L.R.B. 1441, 1442 (1988).* Thus, the Company contends, because the work rules allowed it to determine the appropriate disciplinary measures for any violation, it lawfully disciplined employees Gonzalez, Martin, and Csongedi. Although **[*1119]** both parties raised before the Board the issue of waiver concerning the implementation of new work rules, the Board failed to address this argument in its decision. Instead, the Board focused on its finding of no impasse and summarily concluded that the absence of an impasse rendered unlawful the Company's modification of work rules and any consequent employee disciplinary action. *See Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 2-4. It follows from our holding **[**32]** on

impasse that the Company lawfully implemented its Final Offer, including the amended work rules that led to the discipline of the employees. *See Katz, 369 U.S. at 742-43; Taft Broad. Co., 163 N.L.R.B. at 478.* Therefore, we grant the petition as to the work rules and subsequent disciplinary actions. n12

n11 Under the expiring agreement, the Company had the right to implement work rules and quality and productivity standards unilaterally; the Union, in turn, had the right to grieve the reasonableness of the rules through an established grievance and arbitration procedure. On September 22 (after implementing its Final Offer), the Company amended its Work Rule 5 to classify a failure to work overtime as a work rule violation, subject to immediate discipline under the Company's progressive disciplinary system.

n12 Because we reverse the Board's finding that TruServe unlawfully implemented its Final Offer, including the TruServ health insurance plan option for employees, there is no occasion to address TruServe's contention that the Board's remedial order should be modified to provide that TruServ would owe no contributions to the Union's Welfare Fund for employees who had opted into the TruServe plan, or, alternatively, would receive a set off against claims it had paid for such employees.

Regarding the grievance procedure, the Company concedes that it abandoned the formal procedure established by the Agreement, but maintains that its obligation to process grievances, [**33] *see Hilton's Envt'l, Inc., 320 N.L.R.B. 437, 454 (1995),* was adequately satisfied by "the Company's willingness to discuss grievances at the highest levels rather than rote processing at each lower grievance step." Further, the Company maintains that a grievance form signed by the Union is evidence that the Company did not bypass the Union in settling a grievance with one employee. These contentions are meritless. The Board's finding that the Company acted unlawfully in refusing to process grievances is supported by substantial evidence. Despite the Company's position that its new approach was superior, the Company was not free to replace unilaterally the contractual grievance procedure. *See NLRB v. United Nuclear Corp., 381 F.2d 972, 977-78 (10th Cir. 1967); Hilton's Envt'l, Inc., 320 N.L.R.B. at*

454. Furthermore, substantial evidence supports the Board's finding that the Company's direct dealings with an employee violated § 8(a)(1) and (5) of the Act. *See Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684, 88 L. Ed. 1007, 64 S. Ct. 830 (1944); Toledo Typographical Union No. 63 v. NLRB, 285 U.S. App. D.C. 214, 907 F.2d 1220, 1222 (D.C. Cir. 1990).* **[**34]** That the Union signed the grievance form in question indicates the Union's involvement in the filing of the grievance, not the Union's participation in the resolution of the grievance. The Company's alternative contention for upholding its unilaterally imposed grievance procedure, "no harm, no foul," was not presented to the Board, and hence is not properly before the court. *See 29 U.S.C. § 160*(e); *Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-66, 72 L. Ed. 2d 398, 102 S. Ct. 2071 (1982); Alwin Mfg. Co., Inc. v. NLRB, 338 U.S. App. D.C. 134, 192 F.3d 133, 143 (D.C. Cir. 1999).*

[35]**

n12 The Board's remedial order required the Company, in relevant part, to (1) cease and desist from specified unfair labor practices; (2) bargain in good faith with the Union; (3) rescind all unilaterally implemented terms and conditions of employment upon the Union's request; (4) cancel and rescind discipline issued pursuant to the new rules; and (5) make whole those employees who lost wages as a result of the unlawful discipline, and offer reinstatement to unlawfully discharged employees. *See Cotter & Co., 331 N.L.R.B. No. 94,* slip op. at 5, 19-20; *see also 29 U.S.C. § 160*(c).

[36]**

Accordingly, we grant the petition in part and deny the petition in part.

TruServ Corporation, f/k/a Cotter & Company, Petitioner v. National Labor Relations Board, Respondent; Teamsters Local Union No. 293, Intervenor

NO. 00-1356

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2001 U.S. App. LEXIS 18759; 168 L.R.R.M. 2036

August 17, 2001, Filed

NOTICE:
[*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY:
Amended Opinion of July 6, 2001, Reported at: *2001 U.S. App. LEXIS 15103.*

JUDGES:
Before: EDWARDS, ROGERS and GARLAND, Circuit Judges.

OPINION:

On the Joint Petition for Rehearing by TruServ Corporation and the National Labor Relations Board

ORDER

Upon consideration of the joint petition for rehearing, it is **ORDERED** that the joint petition for rehearing be granted. It is **FURTHER ORDERED** that the court's opinion filed on July 6, 2001 be amended as follows:

Page 2: Strike the final sentence on this page ("Because, however ... to the Board.").

Page 17: Insert a new footnote at the end of the final sentence on this page. The new footnote is to read:

Because we reverse the Board's finding that TruServe unlawfully implemented its Final Offer, including the TruServ health insurance plan option for employees, there is no occasion to address TruServe's contention that the Board's remedial order should be modified to provide that TruServ would owe no contributions to the Union's Welfare Fund for employees who had opted into the TruServe plan, or, alternatively, would receive a set off [*2] against claims it had paid for such employees.

Pages 19-20: Delete the last full paragraph beginning on page 19 and ending on page 20 ("Finally, the Company maintains that the Board's remedial order ... (2d Cir. 1991).").

Page 20: Revise the last sentence of the opinion to read:

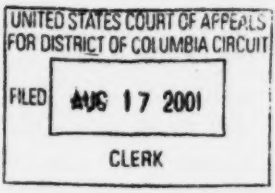
"Accordingly, we grant the petition in part and deny the petition in part."

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1356 **September Term, 2000**

Filed On:



TruServ Corporation, *f/k/a* Cotter & Company,
Petitioner

v.

National Labor Relations Board,
Respondent

Teamsters Local Union No. 293,
Intervenor

BEFORE: Edwards, Rogers and Garland, Circuit Judges

ORDER

Upon consideration of intervenor's petition for rehearing filed August 6, 2001, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Linda Jones
Linda Jones
Deputy Clerk